EDITOR'S NOTE

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(9)

o. 85-5345-CSY
tatus: GRANTED

Title: David Buchanan, Petitioner
v.
Kentucky

ocketed:
ugust 12, 1985

Court: Supreme Court of Kentucky

Counsel for petitioner: Hectus, C. Thomas, McNally, Kevin Michael

Counsel for respondent: Armstrong, David L., Smith, David A.

try	Date	Note	Proceedings and Orders
1	Aug 12 1985	G	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
3	Sep 9 1985		Waiver of right of respondent Kentucky to respond filed.
4	Sep 19 1985		DISTRIBUTED. October 11, 1985
7	Oct 4 1985	F	Response requested.
8	Nov 4 1985		Brief of respondent Kentucky in opposition filed.
9	Nov 7 1985		REDISTRIBUTED. November 27, 1985
0	May 16 1986		REDISTRIBUTED. May 22, 1986
2	May 27 1986		Petition GRANTED.
			**********
4	Jun 25 1986		Order extending time to file brief of petitioner on the merits until August 11, 1986.
5	Jul 14 1986		Joint appendix filed.
6	Aug 11 1986		Brief of petitioner David Buchanan filed.
8	Sep 8 1986		Order extending time to file brief of respondent on the merits until October 1, 1986.
9	Oct 1 1986		Brief amicus curiae of Arkansas, et al. filed.
0	Oct 7 1986		Brief of respondent Kentucky filed.
1	Oct 22 1986		CIRCULATED.
2	Nov 14 1986		SET FOR ARGUMENT. Monday, January 12, 1987. (3rd case)
3	Nov 20 1986	X	Supplemental brief of respondent Kentucky filed.
5	Dec 4 1986	G	Motion of petitioner for appointment of counsel filed.
6	Dec 5 1986		DISTRIBUTED. Dec. 12, 1986. (Motion of petitioner for appointment of counsel.
7	Dec 4 1986	D	Motion of petitioner for divided argument filed.
8	Dec 15 1986		Motion for appointment of counsel GRANTED and it is ordered that Kevin Michael McNally, Esquire, of Frankfurt, Kentucky, is appointed to serve as counsel for the petitioner in this case.
9	Dec 15 1986		Motion of petitioner for divided argument DENIED.
0	Dec 17 1986		Record filed.
1	Dec 17 1986		Certified original record, 18 volumes, received.
2	Dec 29 1986	X	Reply brief of petitioner David Buchanan filed.
5	Jan 12 1987		ARGUED.

EDITOR'S NOTE

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NO. 85-5348

ORIGINAL

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1984

DAVID L. BUCHANAN,

PETITIONER

-v.-

COMMONWEALTH OF KENTUCKY,

RESPONDENT

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF KENTUCKY

C. THOMAS HECTUS
GITTLEMAN & BARBER
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COUNSEL FOR PETITIONER

PETITION FOR CERTIORARI FILED AUGUST 12, 1985

30 pp

QUESTIONS PRESENTED FOR REVIEW

WHETHER PETITIONER'S TRIAL BY A "DEATH-QUALIFIED" JURY WHERE HE DID NOT FACE THE SANCTION OF CAPITAL PUNISHMENT, VIOLATED DUE PROCESS OF LAW BY EFFECTIVELY IMPANELLING A CONVICTION-PRONE JURY, AND FURTHER, DENIED PETITIONER DUE PROCESS AND HIS SIXTH AMENDMENT RIGHTS BY EXCLUDING A JURY CHOSEN FROM A FAIR CROSS-SECTION OF THE COMMUNITY?

WHETHER APPELLANT'S CONVICTION WAS OBTAINED IN VIOLATION OF DUE PROCESS OF LAW WHERE EVIDENCE FROM A POST-ARREST COMPETENCY EVALUATION WAS ADMITTED AGAINST HIM AT TRIAL?

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TABLE OF AUTHORITIES

Petitioner, David Buchanan, respectfully prays that a Writ of Certiorari issue to review the opinion of the Supreme Court of Kentucky entered on June 13, 1985.

OPINION BELOW

The opinion of the Supreme Court of Kentucky was rendered on June 13, 1985, and was designated to be published. [Appendix, hereinafter A., pp. 1-7].

JURISDICTION

The opinion of the Supreme Court of Kentucky was rendered on June 13, 1985. No rehearing was sought. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution, which states in pertinent part:

> No person . . . shall be compelled in any criminal case to be a witness against himself. . ..

The Sixth Amendment to the United States Constitution, which states in pertinent part:

> . . . the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State . . .

The Fourteenth Amendment to the United States Constitution, which states in pertinent part:

> . . . nor shall any State deprive any person or liberty . . . without due process of law. . ..

STATEMENT OF CASE

David Buchanan (Petitioner herein) was indicted with Kevin Stanford for the murder, robbery, rape, and sodomy of Baerbel Poore.

Prior to trial, Buchanan moved to preclude "death qualification" of the jury during the guilt-innocence phase of the trial. Alternatively, he moved for separate juries for the guilt-innocence phase and sentencing phases of the trial.

Also prior to trial, Petitioner moved the trial court to order that Count I (Murder) be prosecuted as a Class A felony, rather than as a capital offense. Specifically, he argued that the Commonwealth's evidence was that Petitioner was not the "trigger man," and further, that he did not have "shared intent" with Kevin Stanford to kill the victim. Accordingly, Petitioner argued, Enmund v. Florida, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982) precluded the availability of the death sentence. The trial court granted Petitioner's motion, specifically noting that the Commonwealth had no objection thereto, and further, that the Assistant Commonwealth Attorney conceded that "(the) death penalty would be unconst[itutional] for Buchanan under Enmund v. Fla."

Trial commenced on August 2, 1982. Prior to selection of the jury, Petitioner renewed his motion to preclude "death qualification" of the jury, particularly in view of the fact that he could not be subject to the death penalty. The court overruled Petitioner's motion. The court then proceeded to death-qualify the venire. From this death-qualified venire, a jury was impaneled to try the case.

At trial, M. K. Nalley testified that in January, 1981, he was a county correctional officer on duty at the Juvenile Detention Center. He testified that he asked Petitioner's co-defendant, Kevin Stanford, who was being detained at the Center at that time, why he killed the victim. According to Nalley, Stanford replied that "I had to shoot her, the bitch lived next door to me and she would recognize me."

At the close of the Commonwealth's case, Petitioner moved for a directed verdict as to the murder charge. Specifically, Petitioner argued that, since the Commonwealth's evidence was that Kevin Stanford shot the victim, the Commonwealth would be required to prove evidence of a plan, conspiracy, or such facilitation by David Buchanan as would rise to accomplice liability to the murder. Given that a third accomplice, Troy Johnson, testified that David Buchanan had assured him that no one

would be hurt, the Commonwealth's evidence was uncontradicted that there was in fact no plan to commit a murder. The Commonwealth responded that, if Petitioner were participating in either the robbery, sodomy or rape, "he qualified as a complicitor and therefore, is subject to, basically, the same penalty as the individual who did the killing." The court agreed "that's my understanding of the law, too. . ." The court overruled the motion for directed verdict.

Petitioner then called Ms. Martha Elam on his behalf. Ms. Elam testified that she was a social worker with the Department of Human Resources, and that her duties included working with juveniles who have been committed to the Department. She testified that Petitioner was first committed to the Department on May 1, 1980. At that time he was placed at Danville Youth Development Center. Approximately one month later, Petitioner was evaluated by a psychologist, Dr. Michael Neetzle. The test results showed Petitioner to have a full scale IQ of 74. There were also indications of emotional disturbance. The pattern of his test responses suggested a mild thought disorder.

As a result of that psychological evaluation, Petitioner was transferred to Northern Kentucky Treatment Center, a facility for emotionally disturbed youths. At Northern Kentucky, he was evaluated by Dr. Robert Nolker. Dr. Nolker's report concurred in the previous diagnosis of thought disorder. The tests revealed Petitioner's thinking to be "extremely simplistic and very concrete." Furthermore, Dr. Nolker found Petitioner to be "pretty severely emotionally disturbed . . . very easily confused . . . extremely limited capacity for insight . . . [and] easily led by other more sophisticated delinquents or youths." At the time of his evaluation, Dr. Nolker felt that Petitioner had "potential for developing a full-blown schizophrenic disorder." The date of Dr. Nolker's report was August 21, 1980. This was some four-and-a-half months prior to the offense for which Petitioner eventually was tried.

Subsequently, Petitioner was admitted for treatment to Northern Kentucky Treatment Center. A progress report of September 26, 1980, indicated that Petitioner continued to be extremely resistent to all treatment methods utilized up to that date. Nonetheless, some two weeks later, on October 10, 1980, the director of Northern Kentucky Treatment Center sent a letter to Judge Snyder of the Jefferson County Juvenile Court indicating that Petitioner would be able to function more positively in the community, and that he would be released some time within two weeks from the date of the correspondence. Three days later, Petitioner was released from Northern Kentucky Treatment Center and placed at home with his mother. He was placed in the regular academic program at Pleasure Ridge Park High School. Later, Petitioner was transferred to Butler High School and placed in an Educable Mentally Handicapped (EMH) Program. However, he did not attend school regularly. Nonetheless, the Department of Human Resources took no administrative action to revoke Petitioner's "home supervised placement" prior to his arrest on January 16, 1981.

On cross-examination, the prosecutor attempted to elicit information from evaluations done subsequent to Petitioner's arrest, with regard to his competence to stand trial. Petitioner objected to the introduction of the results of any competence evaluations. Specifically, Petitioner asserted that a determination of competence to stand trial was not relevant to rebut a diagnosis of emotional disturbance, and that the criteria by which the different determinations are made are not related. Additionally, Petitioner objected that the reports could not be used because he was in custody, and was not informed that he could have counsel present during the testing procedure, nor was he told that anything he said during the competence evaluations could be used against him at trial. However, the court overruled the objection and allowed the witness to read from the competence evaluations.

Ms. Elam then read from an evaluation done by Dr. Robert Ryan, M.D., on August 14, 1981. The report indicated that "David was appropriate interactionally . . . in good reality contact . . . and seemed to be function in full normal IQ range."

During the instruction conference, Petitioner objected to giving any murder instruction, based upon the same grounds as previously raised in his motion for a directed verdict. With regard to the homicide, the trial court instructed the jury on intentional murder (complicity); wanton murder; manslaughter first degree; manslaughter second degree; and reckless homicide.

In his closing argument, the prosecutor referred to Petitioner's competency evaluation in August, 1981 (some seven months after the offense in question) in order to rebut Petitioner's evidence of emotional disturbance: "All the material which he read to you, do you remember when he put Miss Elam on, he didn't mention anything with mention to that last psychological or psychiatric evaluation."

With reference to the murder charge, the prosecutor stated that he was not asking the jury to find appellant guilty of intentional murder:

> I am not asking you to find him guilty under Instruction Number 1. You see and the reason I'm not, to be perfectly honest with you, our position is that the evidence points that that's the man [Stanford] who pulled the trigger, you see. His [Buchanan's] involvement comes up because he was involved in the conspiracy to commit the robbery initially because he is the individual that started the ball to rolling which lead to the taking of the life of Baerbel Poore. He is the individual that went into the Checker Station and apparently agreed with Kevin Stanford that they were going to rape and they were going to sodomize the young lady. He gets involved in the murder because there was apparently an agreement to remove her from the Checker Station and take her down Shanks Lane and, as he told Troy, they were going to get some more. The reason that he is guilty, ladies and gentlemen, under Instruction Number 2 is that during the continuation of the extension of those conspiracies, because of the fact that he actually traveled down to the car to debase her some more; to violate her

> some more; that means the conspiracy was still continuing . . . In Instruction Number 2, you convict him of murder because he involved himself in crimes which the ordinary person knows can lead to the loss of life. You will convict him under that instruction, it says, a wanton, indifference to the value of human life, because when he got the weapon. . . we know he was indifferent to anybody's life but his. . . [T.E., Vol. IX, pp. 1336-1337].

After deliberating, the jury convicted Petitioner of intentional murder under Instruction No. 1, and fixed his punishment at life imprisonment. Final judgment in conformity with the jury verdict was entered on September 17, 1982.

APPELLATE HISTORY

On direct appeal, the Supreme Court of Kentucky affirmed Petitioner's conviction, holding that death-qualification of the jury did not necessarily result in an extraordinarily conviction-prone jury or make the panel "unrepesentative of a fair cross-section of the community." The Court cited People v. Kirkpatrick, 70 Ill.App. 3d 166, 387 N.E.2d 1284 (1979), for the proposition that "no reviewing court has found any valid data indicating that a death-qualified jury is conviction prone."

The Court further held that "(p)ersons who are unalterably opposed to capital punishment do not constitute a cognizable group for the purpose of the fair cross-section requirement."

Additionally, the Court said evidence of Petitioner's competency report did not violate his privilege against self-incrimination because it "contained no inculpatory statements by Buchanan or any acusatory observation by the examiner. . ."

Lastly, the Court said Petitioner "waived his right to silence by giving the police a confession," thus any error in admitting the competency report was "nonprejudicial and harmless beyond a reasonable doubt. . ."

REASONS FOR GRANTING THE WRIT

THIS IS A CASE OF FIRST IMPRESSION FOR THIS COURT, WHEREIN THE COURT MUST RESOLVE THE QUESTION OF WHETHER A CO-DEFENDANT'S TRIAL BY A "DEATH

QUALIFIED" JURY, WHERE HE DID NOT FACE THE SANCTION OF CAPITAL PUNISHMENT, VIOLATED DUE PROCESS OF LAW BY EFFECTIVELY EMPANELLING A CONVICTION-PRONE JURY, AND FURTHER, DENIED PETITIONER DUE PROCESS AND HIS SIXTH AMENDMENT RIGHTS, BY EXCLUDING A JURY CHOSEN FROM A FAIR CROSS-SECTION OF THE COMMUNITY.

ADDITIONALLY, THIS COURT MUST DECIDE IF PETITIONER'S CONVICTION WAS OBTAINED IN VIOLATION OF DUE PROCESS OF LAW WHERE EVIDENCE FROM A POST-ARREST COMPETENCY EVALUATION WAS ADMITTED AGAINST HIM AT TRIAL.

The Sixth Amendment to the Federal Constitution guaranatees the right of a defendant to be tried by a jury drawn from a fair cross-section of the community. Duncan v. Louisiana, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968).

Prior to trial, Petitioner moved the court to either preclude "death-qualification," or to impanel two juries for the bifurcated trial, one to assess guilt, and another to impose sentence. [At the time of his motion, Petitioner faced a possible sentence of death if convicted]. However, the court refused both requests.

Subsequently, the court ruled, and the prosecution agreed, that Enmund v. Florida, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982), precluded the imposition of the death penalty for Petitioner. At trial, counsel for Petitioner renewed his motion to preclude "death-qualification" or for separate juries, contending that a "death-qualified" jury would be significantly more "prosecution-oriented." The court overruled the motion. By requiring that Petitioner be tried by a "death-qualified" jury, the court denied Petitioner a jury drawn from a fair cross-section of the community. Taylor v. Louisiana, 419 U.S. 522, 95 S.Ct. 692, 42 L.Ed.2d 690 (1974).

In Petitioner's case, the selection of the jury pursuant to procedures authorized for capital defendants by Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968), served to produce a jury statistically more likely to convict, and to be more severe when it came to sentencing. The requirement

that jurors be selected from a cross-section of the community does not guarantee that the jury so drawn will in fact be representative. Nonetheless, the selection process must not exclude an identifiable group. This is precisely what occurred in Petitioner's trial. Jurors who had conscientious scruples against the imposition of a death sentence were excluded, despite the fact that the ultimate penalty was unavailable for their consideration.

As the United States Supreme Court stated in Duren v. Missouri, 493 U.S. 357, 368, note 26, 99 S.Ct. 664, 58 L.Ed.2d 579 (1979):

> "in Sixth Amendment fair-cross-section cases, systematic disproportion itself demonstrates an infringement of the defendant's interest in a jury chosen from a fair community cross section. The only remaining question is whether there is an adequate justification for the infringement. . ."

Exclusion may be justified only by the showing of a significant state interest, and the Commonwealth has the burden to show that interest. Taylor, supra 419 U.S. at 534.

The state had no legitimate interest in death-qualifying jurors in Petitioner's case. The state had conceded the Petitioner could not be tried as a capital defendant. The impanelling of a death qualified jury only served the state's interest of having a prosecution-oriented panel.

Prior to trial, counsel for Petitioner had tendered to the court a study, Some Data on Juror Attitudes Towards Capital Punishment by Hans Zeisel, published by the Center for Studies in Criminal Justice at the University of Chicago Law School. The state neither challenged the study, nor presented any contravening evidence. The data relied on by the author showed that a significant percentage of the United States population was opposed to capital punishment. In that Witherspoon-questioning excluded this significant segment of the population from Petitioner's jury, it logically follows that Petitioner was denied a representative jury. While the state may well have had an adquate justification to exclude those prospective jurors with scruples about the death penalty from the co-defendant's jury, it merely served to

systematically exclude jurors otherwise qualified to hear Petitioner's case.

The United States Supreme Court recognized, in Justice Stewart's note in Witherspoon, supra, 391 U.S. 520 footnote 16, that in 1966, approximately 42% of the American public favored capital punishment for convicted murderers, while 47% opposed it and 11% were undecided. If these figures are still reasonably accurate, then approximately 47% of the community were excluded as jurors from Petitioner's venire.

Petitioner would further submit the following language from Witherspoon, 391 U.S. 520-521, 88 S.Ct. 1776 applies in the case at bar:

> If the state had excluded only those prospective jurors who stated in advance of trial that they would not even consider returning a verdict of death, it could argue that the resulting jury was simply "neutral" with respect to penalty. But when it swept from the jury all who expressed conscientious or religious scruples against capital punishment, and all who opposed it in principle, the state crossed the line of neutrality. In its quest for a jury capable of imposing the death penalty, the state produced a jury uncommonly willing to condemn a man to die.

In the instant case, only jurors who could consider the death sentence for a capital co-defendant were allowed to decide the guilt and impose the sentence on the non-capital Petitioner. The court, in effect, had produced a jury "uncommonly willing" to impose the most severe punishment.

A conflict among the federal circuits has arisen over this issue as it applies to defendants facing the sanction of capital punishment. In Grigsby v. Mabry, 758 F.2d 226 (8th Cir. 1985), the Court held that a capital jury, with jurors who hold absolute scruples against the death penalty excluded for cause, violates a defendant's Sixth Amendment right to a jury composed of cross-sectional representation of a given community. In affirming the district court's decision, the Grigsby Court cited extensive evidence supporting the lower court's finding that a jury with "Witherspoon excludables" stricken for cause is a conviction-prone

jury. 758 F.2d at 232.

It is important to re-emphasize that the debate over the constitutionality of death-qualified juries has heretofore involved defendants who are tried for capital offenses. Petitioner did not face the sanction of capital punishment, yet he was tried before a death-qualified jury. As noted above, Petitioner tendered data to support the proposition that death-qualified jurors were more prone to convict and it was not rebutted.

The trial court's failure to impanel a separate, non-death-qualified jury on behalf of Petitioner deprived him of due process and of his Sixth Amendment right to have a jury selected from a representative cross-section of the community.

PETITIONER'S CONVICTION WAS OBTAINED IN VIOLATION OF DUE PROCESS OF LAW WHERE EVIDENCE FROM A POST-ARREST COMPETENCY EVALUATION WAS ADMITTED AGAINST HIM ~~AT TRIAL~~.

After proceedings were initiated in Juvenile Court upon the same charges which were transferred to the Circuit Court for trial, and while Petitioner was in the custody of the Jefferson County Youth Detention Center, Petitioner was examined to evaluate his competency to stand trial, pursuant to an order of the Jefferson District Juvenile Court. The examining doctor determined that Petitioner was competent. No issue was ever raised by Petitioner as to his competency to stand trial. During his trial, Petitioner presented evidence from his social worker, an employee of the Commonwealth of Kentucky. During the course of her professional relationship with Petitioner, she had access to, and relied upon, certain psychological evaluations which had been done by agents or employees of the Commonwealth of Kentucky during the course of Petitioner's commitment to the Department for Human Resources. During the course of the prosecutor's cross-examination, he inquired of Ms. Elam, the social worker, whether she had any psychological reports subsequent to those to which she had referred during her direct examination. Petitioner objected to the use of any reports which were done as a result of

a court ordered competency evaluation. Specifically, counsel stated:

> Judge, I've other grounds for objections. One, is that this would have been completed at the time David was given these tests, I believe that's prejudicial because it was done at the insistence of Court and counsel was not present and was not informed he could be present and David was not informed, at that time, that they could be used against him as he went to trial and I would cite Estelle versus Commonwealth [sic], which indicates that the defendant has a 5th Amendment right to be told that it may later be used against him and I would object on that ground, also.
>
> The court overruled the motion.

In Estelle v. Smith, 451 U.S. 454, 68 L.Ed.2d, 359, 101 S.Ct 1866 (1981), the United States Supreme Court held that the admission of testimony by a psychiatrist who conducted a court-ordered pretrial competency examination violated both the defendant's Fifth Amendment privilege against self-incrimination, and also the defendant's Sixth Amendment right to counsel. In that case, Ernest Benjamin Smith was indicted for capital murder. Prior to trial, the Texas trial court ordered a psychiatric examination of Smith to determine his competency to stand trial. During the penalty phase of Smith's trial, a Dr. Grigson, who had interviewed Smith to determine his competency, testified, based upon information derived from his "mental status examination" of Smith, regarding Smith's diagnosis, his poor prognosis, and his lack of remorse.

On appeal to the United States Supreme Court, the Court reversed. The Court specifically refuted the state's contention that neither the Fifth nor the Sixth Amendments were implicated. With regard to the Fifth Amendment, the court observed that:

> In Miranda v. Arizona, [cite omitted], the court acknowledged that "the Fifth Amendment privilege is available outside of criminal court proceedings and serves to protect persons in all settings in which their freedom of action is curtailed in any significant way from being compelled to incriminate themselves." Miranda held that "the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation

of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." [Cite ommitted]. Thus, absent other fully effective procedures, a person in custody must receive certain warnings before any official interrogation, including that he has a "right to remain silent" and that "anything said can and will be used against the individual in court." [Cite omitted]. The purpose of these admonitions is to combat what the Court saw as "inherently compelling pressures" at work on the person and to provide him with an awareness of the Fifth Amendment privilege and the consequences of forgoing it, which is the prerequisite for "an intellectual decision as to its exercise."

> The considerations calling for the accused to be warned prior to custodial interrogation apply with no less force to the pretrial psychiatric examination at issue here. Respondent was in custody at the Dallas County Jail when the examination was ordered and when it was conducted. That respondent was questioned by a psychiatrist designated by the trial court to conduct a neutral competency examination, rather than by a police officer, government informant, or prosecuting attorney, is immaterial. When Dr. Grigson went beyond simply reporting to the court on the issue of competency and testified for the prosecution at the penalty phase on a crucial issue of respondent's future dangerousness, his role changed and became essentially like that of an agent of the State recounting unwarned statements made in the post-arrest custodial setting. During the psychiatric evaluation, respondent assuredly was "faced with a phase of the adversary system" and was "not in the presence of [a] perso[n] acting solely in his interest." [Cite omitted]. Yet he was given no indication that the compulsory examination would be used to gather evidence necessary to decide whether, if convicted, he should be sentenced to death. He was not informed that accordingly, he had a constitutional right not to answer the questions put to him.

Consequently, the Supreme Court held that Smith's Fifth Amendment rights were violated by the admission of Dr. Grigson's testimony at the penalty phase. These same considerations compel that result here. Petitioner was in custody when the examination was conducted at the instance of the Juvenile Court. Petitioner was given no warnings that his responses could

be used against him at trial. Even though Dr. Ryan, who evaluated Petitioner, did not testify, his report was nonetheless used to discredit Petitioner's claim of emotional disturbance. Consequently, without warnings, the introduction of testimony based upon Dr. Ryan's report violated Petitioner's Fifth Amendment rights.

Also in Estelle v. Smith, supra, the United States Supreme Court concluded that a defendant had a Sixth Amendment right to the assistance of counsel before submitting to the psychiatric examination. The court stated:

> Here, respondent's Sixth Amendment right to counsel clearly had attached when Dr. Grigson examined him at the Dallas County Jail, and their interview proved to be a "critical stage" of the aggregate proceedings against respondent. [Cite omitted]. Defense counsel, however, were not notified in advance that the psychiatric examination would encompass the issue of their client's future dangerousness, and respondent was denied the assistance of his attorneys in making the significant decision of whether to submit to the examination and to what end the psychiatrist's findings could be employed." [Estelle v. Smith, supra, 451 U.S. at 470-471].

Notably, the Supreme Court did not find that Smith had the right to have counsel actually present at the competency evaluation.

In fact, the Court seemed to approve the recognition by the Court of Appeals that "an attorney present during the psychiatric interview could contribute little and might seriously disrupt the examination." [Id, 451 U.S. 470, fn. 14]. Rather, the crux of the holding of the Supreme Court was that Smith had a Sixth Amendment right to consult with counsel prior to the evaluation, and further, to make an intelligent decision as to whether or not to participate in the examination, based upon counsel's advice as to any use to which the state might put the results of the examination. The same holds true for Petitioner's case. The Juvenile Court ordered the evaluation in question. There was never any notice to counsel that the state would use the results of that evaluation after Petitioner's transfer to adult

court, and during the trial of the state's case-in-chief in order to prejudice a material aspect of Petitioner's defense. This was precisely the concern of the Supreme Court in Estelle v. Smith in finding a violation of Smith's Sixth Amendment right to counsel:

> As the Court of Appeals observed, the decision to be made regarding the proposed psychiatric evaluation is "literally a life or death matter" and is "difficult . . . even for an attorney" because it requires "a knowledge of what other evidence is available, of the particular psychiatrist's bias and predilections, [and] of possible alternative strategies at the sentencing hearing." [Cite omitted]. It follows logically from our precedents that a defendant should not be forced to resolve such an important issue without "the guiding hand of counsel." [Estelle v. Smith, supra, 451 U.S. 471].

Because the introduction of evidence from Petitioner's competency evaluation by Dr. Ryan was introduced against him at trial, and further, because neither Petitioner nor his counsel were advised that his responses would be used against him, the introduction of such evidence violated both the Fifth and Sixth Amendments.

CONCLUSION

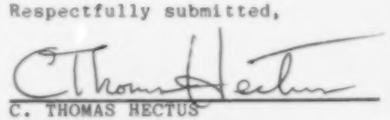
Petitioner's trial by a "death-qualified" jury, where he did not face the sanction of capital punishment, violated due process of law and petitioner's Sixth Amendment rights by empanelling a conviction-prone jury and one which was not composed of cross-sectional representation of the community.

There is a conflict among the federal circuits on the question of the constitutionality of th death-qualified jury for defendants facing capital punishment. Since the charges against petitioner did not rise to that level, it was fundamentally unfair for his case to be tried to a death-qualified jury.

Furthermore, petitioner's conviction was obtained in violation of due process of law where evidence from a post-arrest competency evaluation was admitted against him at trial in violation of this Court's holding in Estelle v. Smith.

Because the decision of the Supreme Court of Kentucky in this case conflicts with previous holdings of this Court, a Writ of Certiorari should issue to review the opinion of the Supreme Court of Kentucky.

Respectfully submitted,



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RENDERED: June 13, 1985
TO BE PUBLISHED

Supreme Court of Kentucky

83-SC-58-MR

DAVID BUCHANAN — APPELLANT

V. — APPEAL FROM JEFFERSON CIRCUIT COURT
HON. CHARLES M. LEIBSON, JUDGE
82-CR-0406

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION OF THE COURT BY JUSTICE WINTERSHEIMER

AFFIRMING

This appeal is from a judgment based on a jury verdict which convicted Buchanan of murder, robbery, rape and sodomy and sentenced him to life in prison.

The questions presented are whether the trial by a death-qualified jury where Buchanan did not face capital punishment violated due process by excluding a jury panel composed from a fair cross-section of the community, whether there was sufficient evidence to support the finding that Buchanan intended the victim's death, whether there is sufficient evidence to support a finding that he was not acting under extreme emotional disturbance at the time of the murder, whether the trial judge properly allowed the prosecution to introduce evidence of the competency evaluation, and whether the evidence of competency did violate his privilege against self-incrimination.

Barbel Poore was raped, sodomized and murdered in connection with the robbery of a gas station in Louisville on January 7, 1981. She, a 20-year-old service station attendant, was shot twice in the head. Kevin Stanford was convicted as the trigger man. Buchanan accompanied Stanford and was also convicted of murder. Both Stanford and Buchanan were tried together. Stanford was sentenced to death, but Buchanan received a life sentence. This appeal followed.

This Court affirms the judgment of the circuit court.

In a joint trial for capital murder where the death penalty is sought against one defendant, but not the other, the impaneling of a death-qualified jury does not deprive the defendant of the right to a trial by a fair and impartial jury selected from a fair cross-section of the community.

Buchanan's pretrial motion to preclude death-qualification of the jury or to postpone such voir dire until the penalty phase of the trial was overruled. The jury was death-qualified individually by the trial judge prior to the guilt phase of the trial. We find no merit in the argument that such a process necessarily resulted in an extraordinarily conviction-prone jury or that it excluded a recognizable group from the jury panel so as to make the panel unrepresentative of a fair cross-section

of the community.

We are not persuaded by the authority of Grigsby v. Mabry, 483 F. Supp. 1372 (E.D. Ark., 1980). Buchanan's arguments have been consistently rejected in other jurisdictions, see Spinkellink v. Wainwright, 578 F. 2d 582 (5th Cir. 1978); United States ex rel. Clark v. Fike,538 F. 2d 750 (7th Cir. 1976);Craig v. Wyse, 373 F. Supp. 1008 (D.D.C. 1974); Martin v. Blackburn, 521 F. Supp. 685 (E.D.La. 1981); State v. Heyman, S.C., 281 S.E.2d 209 (1981); People v. Lewis, 88 111.2d 1129, 430 N.E.2d 1346 (1981); State v. Ortiz, 88 N.M.2d 370, 540 P.2d 850 (1975); Hovey v. Superior Court of Alameda County, Cal., 616 P.2d 1301 (1980).

People v. Kirkpatrick, 70 Ill. App. 3d 166, 26 Ill. Dec. 356, 387 N.E. 2d 1284 (1979) noted that no reviewing court has found any valid data indicating that a death-qualified jury is conviction prone. A death-qualified panel tends to ensure those who serve on the jury to be willing and able to follow the evidence and law rather than their own preconceived attitudes. Such a process furthers the interests of both the defendant and prosecution in presenting the case to an impartial jury. See Gall v. Commonwealth, Ky., 607 S.W. 2d 97 (1980); Meyer v. Commonwealth, Ky., 472 S.W. 2d 479 (1971).

Buchanan's contention that death qualification excludes a cognizable group from the jury panel so as to make it unrepresentative of a fair cross-section of the community is also unconvincing. Persons who are unalterably opposed to capital punishment

do not constitute a cognizable group for the purpose of the fair cross-section requirement. Such persons have diverse attitudes which defy classifications and have not been singled out by the public for special treatment. They do not meet the criteria for making a cognizable class. United States v. Kleifgen, 557 F.2d 1293 (1977); Brown v. Harris, 666 F.2d 782 (2nd Cir. 1981). Opponents of capital punishment are not a distinct opinion-shaped group. See State v. Taylor, 304 N.C. 249, 283 S.E.2d 761 (1981). It was not reversible error to death-qualify the jury.

There is sufficient evidence in the record to support the jury finding that Buchanan intended the death of the victim.

There was testimony from Troy Johnson that Buchanan believed the robbery of the station would be easy because the victim was alone, but nonetheless supplied the bullets for the previously unloaded gun. Johnson also testified that Buchanan borrowed his brother's gun and bullets for use in the robbery, and that he did not believe Buchanan's assurances that the victim would not be harmed. Johnson had agreed to participate in the robbery until Buchanan acquired ammunition for the weapon and then Johnson refused to leave the car.

Buchanan planned the robbery; he acquired the murder weapon and the ammunition. He enlisted the assistance of Stanford and instructed Johnson throughout the affair to remain in his car and to follow the victim's car. Buchanan had the same

motive as Stanford for permanently silencing the victim. He knew that the victim could identify Stanford which meant that he would also ultimately be found. Considering the evidence as a whole, a reasonable jury could conclude that Buchanan intended the victim's death. Trowel v. Commonwealth, Ky., 550 S.W. 2d 530 (1977).

There is sufficient evidence to support the finding by the jury that Buchanan was not acting under extreme emotional disturbance at the time of murder. There is nothing in the record to support the argument that the murder was precipitated by extreme emotional disturbance. The entire sequence of events indicated a cold and calculating premeditated act by Buchanan. He sought the assistance of Stanford and Johnson, obtained a gun and bullets, and timed the robbery so that the victim would be closing the station and probably alone. Certainly this was not an unplanned event. See Brown v. Commonwealth, Ky., 555 S.W. 2d 252 (1977); Gall v. Commonwealth, supra.

The introduction by Buchanan of three Department of Human Resources reports is not evidence of extreme emotional disturbance. See Wellman v. Commonwealth, Ky., ___S.W.2d___ (Rendered June 13, 1985). Evidence of a mental defect alone does not support a defense of extreme emotional disturbance. Wellman, supra. There was sufficient evidence for a jury to find otherwise. There was a letter from DHR to Judge Snydor which noted Buchanan had benefited from treatment. The prosecution also introduced a Danville DHR report indicating that Buchanan was sophisticated, manipulative and cunning. There was also

evidence of Buchanan's August 17, 1981 competency report which indicated that he was functioning normally.

The trial judge properly allowed the prosecution to introduce evidence of Buchanan's competency evaluation.

Buchanan introduced evidence of three DHR reports relating to his mental condition which had been prepared for use by juvenile authorities several months before the crimes herein. The report which Mullins contests was cumulative to the DHR letter and report which already had been introduced into evidence. Buchanan opened the door for the introduction of the competency report by introducing only those DHR reports which were beneficial to him. The fact that the report was made for the purpose of determining his competency to stand trial did not render the objective observations contained therein inadmissible. There is nothing to indicate that Dr. Ryan, the author of the competency report, was any less qualified than the psychologist who prepared the other DHR reports. The evidence of the competency report was nonprejudicial and harmless beyond a reasonable doubt in view of the considerable evidence that the murder was well planned and premeditated. The evidence of the competency report did not affect the ultimate outcome of the the trial. Stiles v. Commonwealth, Ky.App., 570 S.W.2d 645 (1978).

The evidence of Buchanan's competency report did not violate his privilege against self-incrimination. Estelle v. Smith, 451 U.S. 454, 101 S.Ct. 1866, 88 L.Ed.2d 359 (1981).

is distinguishable from this case. In Smith, supra, the defendant was incriminated by his remarks to the examiner. In this case, the report contained no inculpatory statements by Buchanan or any accusatory observation by the examiner who merely recited his observations of Buchanan's outward appearance.

When Dr. Ryan examined Buchanan, he had waived his right to silence by giving the police a confession. Parrish v. Commonwealth, Ky., 581 S.W.2d 560 (1979). Any error in admitting the competency report was nonprejudicial and harmless beyond a reasonable doubt in view of the confession and the overwhelming evidence of guilt. Stiles, supra.

The judgment is affirmed.

All concur, except for Leibson, J., who did not sit.

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Frankfort, Kentucky 40601-3494

85-5348

IN THE
SUPREME COURT OF THE UNITED STATES
NO. _____, October Term, 1984

DAVID L. BUCHANAN
Petitioner,
vs.
COMMONWEALTH OF KENTUCKY
Respondent

* * * * * * * *

CERTIFICATE OF SERVICE

I, C. Thomas Hectus, counsel for Petitioner, certify that the attached Petition for Writ of Certiorari, Appendix, Motion for Leave to Proceed In Forma Pauperis, and Notice of Appearance was mailed to the Office of the Clerk of the United States Supreme Court, Washington, D.C. 20543, to be filed upon receipt, and served upon counsel for for Respondent, Hon. David L. Armstrong, Attorney General, and Hon. David A. Smith, Assistant Attorney General, Commonwealth of Kentucky, Capitol Building, Frankfort, Kentucky 40601, this 12th day of August, 1985, by personally depositing same in a United States mailbox, first-class postage prepaid.

C. Thomas Hectus
C. THOMAS HECTUS
GITTLEMAN & BARBER
635 West Main Street
Louisville, Kentucky 40202
(502) 585-2100

COUNSEL FOR PETITIONER

Subscribed and sworn to before me by C. THOMAS HECTUS, this 12th day of August, 1985.

My commission expires: 1-17-87.

Karen L Kutz
NOTARY PUBLIC
KENTUCKY, STATE AT LARGE

IN THE
SUPREME COURT OF THE UNITED STATES
NO. _____, October Term, 1985

85-5348

DAVID L. BUCHANAN)
)
Petitioner,)
)
vs.)
)
COMMONWEALTH OF KENTUCKY)
)
Respondent)

* * * * * * * *

NOTICE OF APPEARANCE

The Clerk will enter my appearance as counsel for Petitioner. I certify that I am a member of the Bar of the United States Supreme Court. The Clerk is requested to notify the undersigned of action by the Court by regular mail.

C. Thomas Hectus

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Louisville, Kentucky 40202
(502) 585-2100
COUNSEL FOR PETITIONER

IN THE
SUPREME COURT OF THE UNITED STATES
NO. _____, October Term, 1984

85-5348

DAVID L. BUCHANAN)
)
Petitioner,)
)
vs.)
)
COMMONWEALTH OF KENTUCKY)
)
Respondent)

* * * * * * * *

AFFIDAVIT OF MAILING

Comes the Affiant, C. Thomas Hectus, a member of the Bar of this Court, pursuant to Rule 28.2 of the Rules of this Court, being first duly sworn, and states as follows:

1. On August 12, 1985, a Petition for a Writ of Certiorari to be filed on behalf of the Petitioner was deposited in a United States mailbox at Louisville, Kentucky, with first-class postage prepaid. Said Petition for Writ of Certiorari was properly addressed to the Clerk of this Court.

2. In the knowledge of the Affiant, the mailing of the Petition for a Writ of Certiorari took place on August 12, 1985, and is within the time permitted for filing the Petition pursuant to Rule 20.1 of the Rules of this Court.

FURTHER THE AFFIANT SAYETH NOT.

C. Thomas Hectus

C. THOMAS HECTUS

Subscribed and sworn to before me by C. THOMAS HECTUS, this 12th day of August, 1985.

My commission expires: 12-4-88.

Laura E Hoskins

NOTARY PUBLIC
KENTUCKY, STATE AT LARGE

35-5348

CERTIFICATE

I do hereby certify that a copy of this motion was served by depositing same in a United States mailbox, with first-class postage prepaid, to Hon. David L. Armstrong, Attorney General, and Hon. David A. Smith, Assistant Attorney General, Counsel for Respondent, Capitol Building, Frankfort, Kentucky 40601, on August, 12, 1985.

C. THOMAS HECTUS
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635 West Main Street
Louisville, Kentucky 40202
(502) 585-2100
COUNSEL FOR PETITIONER

ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES
NO. 85-5348

DAVID BUCHANAN — PETITIONER

versus

COMMONWEALTH OF KENTUCKY — RESPONDENT

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

BRIEF FOR RESPONDENT

DAVID L. ARMSTRONG
ATTORNEY GENERAL

DAVID A. SMITH
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October Term, 1985

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II.

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IN THE
SUPREME COURT OF THE UNITED STATES
NO. 85-5348

DAVID BUCHANAN — PETITIONER

versus

COMMONWEALTH OF KENTUCKY — RESPONDENT

MAY IT PLEASE THE COURT:

JURISDICTION

The jurisdictional facts recited by Petitioner are accepted as correct.

PROCEDURAL HISTORY

Petitioner was indicted March 4, 1982 for the Capital Murder, First Degree Sodomy, First Degree Rape, First Degree Kidnapping (later merged), and First Degree Robbery of Barbel Poore, a 20 year old female gas station attendant. (Record, hereinafter R, pages 1-3). Co-defendant Kevin Stanford was indicted with him for Capital Murder, First Degree Sodomy, First Degree Robbery, and Receiving Stolen Property. (Id.).

At the beginning of their joint trial, Petitioner was exempted from candidacy for the death penalty but Stanford was not. (R 170).

The jury recommended the maximum authorized punishment on all counts, and the trial Judge[1] imposed Petitioner's sentence on September 17, 1982. (R 371-373).

---

1. The Honorable Charles M. Leibson, now Justice of the Kentucky Supreme Court.

On June 13, 1985 the Supreme Court of Kentucky unanimously[2] affirmed Petitioner's conviction at 691 S.W.2d 210.

Petitioner's request for writ of certiorari was mailed on August 12, 1985.

OPINION BELOW

In an opinion by Mr. Justice Wintersheimer, the Supreme Court of Kentucky held that:

> (1) "In a joint trial for capital murder where the death penalty is sought against one defendant, but not the other, the impaneling of a death-qualified jury does not deprive the defendant of the right to a trial by a fair and impartial jury selected from a fair cross-section of the community." 691 S.W.2d at 211.
>
> "A death-qualified panel tends to ensure those who serve on the jury to be willing and able to follow the evidence and law rather than their own preconceived attitudes. Such a process furthers the interest of both the defendant and prosecution in presenting the case to an impartial jury." (Id. at 212).
>
> "Persons who are unalterably opposed to capital punishment do not constitute a cognizable group for the purpose of the fair cross-section requirement. Such persons have diverse attitudes which defy classifications and have not been singled out by the public for special treatment. They do not meet the criteria for making a cognizable class." (Id. at 212).
>
> (2) "There is sufficient evidence in the record to support the jury finding that Buchanan intended the death of the victim." (Id. at 212).
>
> (3) "There is sufficient evidence to support the finding by the jury that Buchanan was not acting under extreme emotional disturbance at the time of murder." (Id. at 212).
>
> (4) "The trial judge properly allowed the prosecution to introduce evidence of Buchanan's competency evaluation." (Id. at 213).

2. Mr. Justice Leibson took no part in the decision. 691 S.W.2d at 213.

> "The report which Buchanan contests was cumulative to the DHR[3] letter and report which already had been introduced into evidence. Buchanan opened the door for the introduction of the competency report by introducing only those DHR reports which were beneficial to him." (Id. at 213).
>
> "The evidence of the competency report was nonprejudicial and harmless beyond a reasonable doubt in view of the considerable evidence that the murder was well planned and premeditated. The evidence of the competency report did not affect the outcome of the trial." (Id. at 213).
>
> (5) "The evidence of Buchanan's competency report did not violate his privilege against self-incrimination." (Id. at 213).
>
> "In this case, the report contained no inculpatory statements by Buchanan or any accusatory observation by the examiner who merely recited his observations of Buchanan's outward appearances." (Id. at 213).
>
> "When Dr. Ryan examined Buchanan, he had waived his right to silence by giving the police a confession." (Id. at 213).

COUNTERSTATEMENT OF THE FACTS

Respondent hereby adopts the material facts recited in the opinion below. Additional details are supplied in the following arguments.

ARGUMENT

I.

EXCUSAL OF JURORS WHOSE VIEWS ON CAPITAL PUNISHMENT WOULD PREVENT COMPLIANCE WITH THEIR OATH DOES NOT DEPRIVE A DEFENDANT OF THE RIGHT TO AN IMPARTIAL JURY, DRAWN FROM A FAIR CROSS-SECTION OF THE COMMUNITY.

Petitioner's right to a fair trial, by jurors drawn from a fair cross-section of the community, does not entitle him to have his guilt or punishment determined by persons unable or unwilling to comply with the oath of juror. The Constitution does not require that a jury mirror the divergent views of the community on

3. Department of Human Resources.

the criminal justice system, much less that it be composed heedless of the veniremen's qualifications for service. The government, like the defendant, has a legitimate interest in having the case decided by jurors who will adhere to the trial Court's instructions. Witherspoon v. Illinois, 391 U.S. 510 (1968) at 522, note 21; Adams v. Texas, 448 U.S. 38, 45, 50 (1980); Wainwright v. Witt, 105 S.Ct. 844, 848 (1985). Thus, the constitution does not forbid the excusal of veniremen already committed to a particular result.

Petitioner cites Grigsby v. Mabry, 758 F.2d 226 (8th Cir. 1985) as his authority that "death-qualifying" the jury excludes a cognizable group contrary to the Sixth Amendment's fair cross-section requirement, and that it renders the panel "conviction-prone" in violation of Due Process under the Fourteenth Amendment. In that case a sharply divided Eighth Circuit Court of Appeals relied upon opinion polls to conclude that respondents with scruples against the death penalty were more likely to acquit than those without such reservations.

Respondent respectfully submits that the evidentiary underpinnings of Grigsby v. Mabry are unreliable for failure to address the threshold question, which is whether an inalterable opponent of the death penalty can follow the law and evidence in a capital trial as genuinely as one whose view on the subject is not so unyielding. The opinion polls relied upon in Grigsby v. Mabry do no more than confirm the obvious fact that a juror predisposed to vote against the death sentence option, but empanelled to determine guilt or innocence in a capital trial, is prone to automatically vote for acquittal so as to foreclose any opportunity for other jurors to consider execution. The absence of any empirical evidence to the contrary is fatal to Petitioner's claim.

In Keenton v. Garrison, 742 F.2d 129, 133 (4th Cir. 1984) the Fourth Circuit Court of Appeals rejected claims similar to those advanced by Petitioner Buchanan:

> Although the right to a jury trial includes the right to a jury venire drawn from a representative cross-section of the community, it does not include the right to be tried by jurors who are unable or unwilling to follow the law and the instructions of the trial judge in a capital case. Lockett v. Ohio, 438 U.S. 586, 596-597, 98 S.Ct. 2954, 2960, 57 L.Ed.2d 973 (1978). The state as well as the defendant has legitimate and vital interests at stake at both the guilt and penalty stages of a capital case.
>
> * * * * *
>
> Furthermore, as the Fifth Circuit reasoned in Spinkellink v. Wainwright, 578 F.2d 582, 597 (5th Cir. 1978), cert. den., 440 U.S. 976, 99 S.Ct. 1548, 59 L.Ed.2d 796 (1979), members of the venire who are irrevocably opposed to capital punishment would engage in jury nullification if permitted to sit at the guilt stage of a capital case and, therefore, would not be impartial fact finders.

Quoting Smith v. Balkcom, 660 F.2d 573, 579 (5th Cir. 1981), cert.den. 459 U.S. 882, the Court in Keenton v. Garrison, supra, at 134 further noted:

> The guarantee of impartiality cannot mean that the state has a right to present its case to the jury most likely to return a verdict of guilt, nor can it mean that the accused has a right to present his case to the jury most likely to acquit. But the converse is also true. The guarantee cannot mean that the state must present its case to the jury least likely to convict or impose the death penalty, nor that the defense must present its case to the jury least likely to find him innocent or vote for life imprisionment. . . . The logical converse of the proposition that death-qualified jurors are conviction prone is that nondeath-qualified jurors are acquittal prone, not that they are neutral. (Emphasis added).

Petitioner Buchanan has failed to demonstrate that jurors neutral on the death penalty issue are perforce less able or willing to presume innocence, require proof of guilt beyond a

reasonable doubt, or consider the full range of authorized punishment.

He has likewise failed to show that opponents of capital punishment make up a cognizable group which must be represented on the jury in order to satisfy the fair cross-section requirement. Such persons do not comprise a distinctive class any more than do others who favor or are neutral on the death penalty issue. Death penalty opponents have diverse attitudes and characteristics which defy classification, and have not been singled out by the public for special treatment. As such, they do not meet the criteria for distinction as a cognizable group. United States v. Kleifgen, 557 F.2d 1293 (9th Cir. 1977); Brown v. Harris, 666 F.2d 782 (2nd Cir. 1981). In many instances an individual does not even realize his position on the matter unless and until he is summoned for jury service in a capital case, and often times remains uncertain about the subject throughout the voir dire process.

In view of the foregoing, the petition for writ of certiorari should be denied.

II.

THE USE OF A COURT-ORDERED COMPETENCY REPORT TO REBUT MITIGATING EVIDENCE OF EMOTIONAL DISORDER DOES NOT ABRIDGE A DEFENDANT'S PRIVILEGE AGAINST SELF-INCRIMINATION OR RIGHT TO COUNSEL WHERE SILENCE HAD BEEN WAIVED AND COUNSEL WAS UNOPPOSED TO PSYCHIATRIC EXAMINATION.

Petitioner argues that it violated his privilege against self-incrimination and right to counsel for the prosecutor to introduce evidence of a psychiatric report indicating his competence to stand trial. The purpose of introducing such evidence was to refute Petitioner's claim that his alleged emotional disorder should reduce the crime from Murder to Manslaughter.

Petitioner's present counsel, the honorable C. Thomas Hectus, represented him at trial and in the juvenile proceedings which led to his treatment as an adult offender. (Transcript of November 9, 1981 Hearing, page 27). After Petitioner was evaluated during the juvenile proceedings in District Court, Mr. Hectus obtained an order from the Circuit Court requiring further psychiatric examination. (Transcript of November 20, 1981 Hearing, pages 11-17). It is only the initial psychiatric report that Petitioner complains about here.

For several reasons, the introduction of this evidence did not offend the Constitution. First, as noted at 691 S.W.2d 213 of the opinion below, Petitioner had voluntarily waived his privilege of silence in a confession which preceded the subject competency report.

Second, as noted hereinabove, it appears that Petitioner's counsel had notice prior to the initial examination.

Finally, as noted in the opinion below, Id., the evidence was nonprejudicial and could not have contributed to Petitioner's conviction or penalty.

Petitioner's authority of Estelle v. Smith, 451 U.S. 454 (1981) is readily distinguishable on its facts. In that case the defendant received no warnings, his counsel received no notice, and the psychiatrist's testimony could fairly be described as accusatory. By contrast, not only had Petitioner Buchanan been warned to remain silent, and his counsel notified prior to the examination, but the report contained no inculpatory statements or any accusatory observations by the psychiatrist. (Evidence, pages 1143-1144). The psychiatrist here did no more than record his observations of Petitioner's outward appearance. This evidence certainly was less prejudicial, if at all, than the prior treatment reports introduced by Petitioner himself. (Id. at 1124).

CONCLUSION

WHEREFORE, Respondent Commonwealth of Kentucky respectfully requests the Court to deny the petition for writ of certiorari.

Respectfully submitted,

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ATTORNEY GENERAL

David A. Smith

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COUNSEL FOR RESPONDENT

PROOF OF SERVICE

I hereby certify that two copies of Respondent's Brief in Opposition to Petition for Writ of Certiorari has been served by United States Mail, first class postage prepaid, to Hon. C. Thomas Hectus, Gittleman and Barber, 635 West Main Street, Louisville, KY 40202 on this the 1st day of November, 1985.

David A. Smith
Assistant Attorney General

A P P E N D I X

THE COMMONWEALTH OF KENTUCKY

Jefferson Circuit Court, Criminal Division

82CR0406-3

MARCH Term A. D., 19 82

THE COMMONWEALTH OF KENTUCKY

Against

KEVIN STANFORD

DAVID BUCHANAN

1-MURDER (BOTH)
KRS 507.020 Capital Offense
Death or 20 years to Life

2-ROBBERY I (BOTH)
KRS 515.020 Class B Felony
10 to 20 years

COMPLICITY
KRS 502.020

The Grand Jurors of the County of Jefferson, in the name and by the authority of the Commonwealth of Kentucky, charge:

COUNT ONE

That on or about the 7th day of January, 1981, in Jefferson County, Kentucky, the above-named Defendants, Kevin Stanford and David Buchanan, acting alone or in concert with another, committed the capital offense of murder by intentionally or wantonly causing the death of Baerbel Poore by shooting her with a pistol.

COUNT TWO

That on or about the 7th day of January, 1981, in Jefferson County, Kentucky, the above-named Defendants, Kevin Stanford and David Buchanan, acting alone or in concert with another, committed first-degree robbery by threatening the use of physical force upon Baerbel Poore, while armed with a pistol, and in the course of committing a theft at the Checkers Oil Station.

THE COMMONWEALTH OF KENTUCKY

Jefferson Circuit Court, Criminal Division

82CR0406

MARCH Term A. D., 19 82

THE COMMONWEALTH OF KENTUCKY

Against

KEVIN STANFORD

DAVID BUCHANAN

3- RAPE I (BUCHANAN)
KRS 510.040 Class B Felony
10 to 20 years

4- SODOMY I (BOTH)
KRS 510.070 Class B Felony
10 to 20 years

PAGE TWO

The Grand Jurors of the County of Jefferson, in the name and by the authority of the Commonwealth of Kentucky, charge:

COUNT THREE

That on or about the 7th day of January, 1981, in Jefferson County, Kentucky, the above-named Defendant, David Buchanan committed first-degree rape by engaging in sexual intercourse with Baerbel Poore, through the use of forcible compulsion.

COUNT FOUR

That on or about the 7th day of January, 1981, in Jefferson County, Kentucky, the above-named Defendants, Kevin Stanford and David Buchanan, acting alone or in concert with another, committed first-degree sodomy by engaging in deviate sexual intercourse with Baerbel Poore, through the use of forcible compulsion.

THE COMMONWEALTH OF KENTUCKY

Jefferson Circuit Court, Criminal Division

82CR0406

MARCH Term A. D., 19 82

THE COMMONWEALTH OF KENTUCKY

Against

KEVIN STANFORD

DAVID BUCHANAN

5- RECEIVING STOLEN PROPERTY OVER $100
KRS 514.110 Class D Felony
1 to 5 years (Stanford only)

6- KIDNAPPING (Buchanan only)
KRS 509.040 Class B Felony
10 to 20 years

PAGE THREE

The Grand Jurors of the County of Jefferson, in the name and by the authority of the Commonwealth of Kentucky, charge:

COUNT FIVE

That on or about the 7th day of January, 1981, in Jefferson County, Kentucky, the above-named Defendant, Kevin Stanford, committed the offense of receiving stolen property by having in his possession property, of the value of $100 or more, that had been stolen from the Checker Oil Station.

COUNT SIX

That on or about the 7th day of January, 1981, in Jefferson County, Kentucky, the above-named Defendant, David Buchanan, committed the offense of kidnapping when he unlawfully restrained Baerbel Poore against her will, with intent to advance the commission of a felony, to-wit: a murder.

AGAINST THE PEACE AND DIGNITY OF THE COMMONWEALTH OF KENTUCKY.

all counts A TRUE BILL

March 4 82

[redacted] FOREMAN

Jeanne Tucker

NO. 82-CR-0406

JEFFERSON CIRCUIT COURT
DIVISION NINE (9)

COMMONWEALTH OF KENTUCKY — PLAINTIFF

VS. — ORDER

DAVID BUCHANAN — DEFENDANT

* * * * *

Upon motion of the defendant, and the Court being sufficiently advised,

IT IS HEREBY ORDERED that the capital portion of the indictment herein, be, and it hereby so, dismissed. It is further ordered that Count 1 (murder) be prosecuted as a Class A Felony.

Comm. Has No Objection

Charles M. Leibson

HON. CHARLES LEIBSON, JUDGE
JEFFERSON CIRCUIT COURT
DIVISION NINE (9)

DATE: ____________________

JUL 2 [illegible] 1982
PAUL [illegible] MILLER, Clerk
By [illegible] Deputy Clerk

Clerk - Hold
entering This order -
I want Hearing tomorrow
on whether only evid. ~~was~~ is
That Buchanan non-triggerman -
What is the stat of Troy Johnson
as to circumstances of the shooting ??

170 Hearing Held - [illegible] conceded by Com Atty that death penalty would be unconstitutional [illegible] Buchanan [illegible] and VTB [illegible]

NO. 81 CR 1218
82 CR 0406

JEFFERSON CIRCUIT COURT
NINTH DIVISION

COMMONWEALTH OF KENTUCKY — PLAINTIFF

VS — FINAL JUDGMENT

DAVID BUCHANAN — DEFENDANT

The defendant at arraingment at arraignement having entered a plea of not guilty to the following charges included within the indictment; Count 1, Murder, Count 2, Robbery I, Count 3, Rape I and Count 4, Sodomy I and having on the 2nd day of August, 1982,, appeared in open court with his attorney the case was tried before a jury which returned the following verdict on the 12th day of August, 1982: VERDICT NO. 2, WE, THE JURY, FIND THE DEFENDANT, DAVID BUCHANAN, GUILTY OF MURDER UNDER INSTRUCTION NO. 1 AND FIX HIS PUNISHMENT AT CONFINEMENT IN THE PENITENTIARY FOR LIFE (TO BE SERVED CONSECUTIVELY WITH ANY OTHER SENTENCE). /S/ CHARLES B. CORNISH, FOREMAN. VERDICT NO. 12, WE, THE JURY, FIND THE DEFENDANT, DAVID BUCHANAN, GUILTY OF ROBBERY IN THE FIRST DEGREE UNDER INSTRUCTION NO. VI AND FIX HIS PUNISHMENT AT CONFINEMENT IN THE PENITENTIARY FOR 20 YEARS (TO BE SERVED CONSECUTIVELY). /S/ CHARLES B. CORNISH, FOREMAN. VERDICT NO. 14, WE, THE JURY, FIND THE DEFENDANT, DAVID BUCHANAN, GUILTY OF RAPE THE FIRST DEGREE UNDER INSTRUCTION NO. VII AND FIX HIS PUNISHMENT AT CONFINEMENT IN THE PENITENTIARY FOR 20 YEARS (TO BE SERVED CONSECUTIVELY). /S/ CHARLES B. CORNISH, FOREMAN. VERDICT NO. 16, WE, THE JURY, FIND THE DEFENDANT, DAVID BUCHANAN, GUILTY OF SODOMY IN THE FIRST DEGREE UNDER INSTRUCTION NO. VIII AND FIX HIS PUNISHMENT AT CONFINEMENT IN THE PENITENTIARY FOR 20 YEARS (TO BE SERVED CONSECUTIVELY). /S/ CHARLES B. CORNISH, FOREMAN.

On the 14th day of September, 1982, the defendant appeared in open court with his attorney, Tom Hectus, and the court inquired of the defendant and his counsel whether they had a legal cause to show why judgment should not be pronounced, and afforded the defendant and his counsel the opportunity to make statements in the defendant's behalf

and to present any information in mitigation of punishment, and the court having informed the defendant and his counsel of the factual contents and conclusions contained in the written report of the presentence investigation prepared by the Division of Probation and Parole, the Defendant agreed with the factual contents of said report with the exceptional of the statment made in regards to a kitchen knife being found in the juvenile center under a toilet seat. The statement made was that the defendant placed the kitchen knife there. The defendant denies that statement.

Having given due consideration to the written report of the Division of Probation and Parole, and to the nature and circumstances of the crime, and to the history, character and condition of the defendant, the court is of the opinion that imprisonment is necessary for the protection of the public because:

A. there is a substantial risk that the defendant will commit another crime during any period of probation or conditional discharge.

B. the defendant is in the need of correctional treatment that can be provided most effectively by the defendant's commitment to a correctional institution.

C. probation or conditional discharge would unduly depreciate the seriousness of the defendant's crime.

D. the defendant is not eligible for probation or conditional discharge because of the applicability of KRS 533.060.

No sufficient cause having been shown why judgment should not be pronounced, IT IS ORDERED AND ADJUDGED BY THE COURT that the defendant is guilty of Murder, Robbery I, Rape I and Sodomy I and is sentenced to Life on Murder, 20 Years on Robbery I, 20 Years on Rape I and 20 Years on Sodomy I. The sentences of 20 years on Robbery I, Rape I and Sodomy I are to run consecutive with each other for a total of 60 years but to run concurrent with the Life sentence for a total of Life in the Bureau of Corrections.

IT IS FURTHER ORDERED that the sheriff of Jefferson County deliver the defendant to the custody of the Department of Corrections at such location within this Commonwealth as the Department shall designate.

IT IS FURTHER ORDERED that the defendant is hereby credited with time spent in custody prior to sentence, namely 607 days as certified by the jailer of Jefferson County towards service of the maximum term of imprisonment.

After imposing sentence, the court informed the defendant that he has a right to appeal with the assistance of counsel; that if he is financially unable to afford an appeal, a record will be prepared for him at public expense and counsel will be appointed to represent him; that an appeal must be taken within 10 days of the date of judgment, and that the clerk of the court will prepare and file a notice of appeal for him within that time if he so requests. Pending appeal, the defendant is remanded to custody.

Charles M. Leibson

CHARLES M. LEIBSON, JUDGE

ATTESTED: A TRUE COPY

PAULIE MILLER, CLERK

BY Debbie Moore D.C.

CC: ERNEST JASMIN
THOMAS HECTUS

SEP 17 1982

PAULIE MILLER, Clerk

By [illegible]
Deputy Clerk

your Honor.

THE COURT: How about you, Mr. Hectus, on behalf of Mr. Buchanan, do you need a formal reading of the Indictment or advising of his rights?

MR. HECTUS: Judge, I don't believe so. I've represented Mr. Buchanan since the inception of the case in Juvenile Court and I think he understands, at this point, his rights.

THE COURT: First of all, with reference to you, Mr. Stanford, through your counsel, how do wish to plead?

MR. JEWELL: Not guilty.

THE COURT: This is a five count Indictment.

MR. JEWELL: Yes, sir.

THE COURT: The last count of that Indictment has been withdrawn or not bill was passed and I've drawn an 'X' through that to avoid some of the confusion, that's Count 6. Count 1, is the charge of murder, against both of these defendants. Count 2, is a charge of first degree robbery, against both of these defendants. Count 3, is a charge of first degree rape, against David Buchanan. Count 4, is a charge of first degree sodomy, against both, Kevin Stanford and David Buchanan. Count 5, is a charge of receiving stolen property against Kevin Stanford, only. I assume that all of these counts, since they appear to arise out of

on this particular defendant. The possibility of future acts, criminal acts committed by him.

MR. HECTUS: Judge, that is a fact. Psychologist did recommend David be held in an institution where he can be suitably treated. I'll withdraw my motion for bond if the Commonwealth is willing to transfer Mr. Buchanan to a psychiatric facility for treatment pending trial.

MR. WINE: Your Honor the Commonwealth feels that, right now, the conditions of confinement are much too lax and would not agree, at this time, unless there was a hearing or a Court order that he would be transferred anywhere from the Juvenile Detention Center.

THE COURT: Is there an institution that's equiped to treat somebody who's being held in these circumstances? I'm under the impression that the section of the Seven Counties or whatever it is, region...

MR. HECTUS: Cromin.

THE COURT: The Cromin Region does not accept people who are...

MR. WINE: That's correct, your Honor.

THE COURT: That have to be held under guard at the present time.

MR. HECTUS: No, sir. They have been tranferred to Luther Luckett, it's my understanding.

THE COURT: Luther Luckett is up there at the...

MR. HECTUS Your Honor, the Gromin unit is now in Luther Luckett as opposed to when it was in Anchorage. It used to be in Anchorage.

THE COURT. Yes. There's nothing in Anchorage. There's is, now, a facility on the grounds of the Kentucky State Reformatory called Luther Luckett Facility which has a ward to treat people with serious mental illness. Well, can we, by agreed order, provide that this individual, Buchanan, will be held without bond in the Luther Luckett Institution where he will be available for treatment and where, at the same time, all of these concerns that Mr. Wine has, which are either real or imagined without deciding whether they are, would be obviated?

MR. WINE. Judge, my only concern is not knowing the security measures available at the Luther Luckett Center.

THE COURT. Inside the grounds of the Kentucky State Reformatory, I assume that they have adequate security measures to hold a person inside the grounds of the Kentucky State Reformatory. I don't know how you could be anymore incarcerated in the local jail than you are in the Kentucky State Reformatory.

MR. HECTUS: Judge, if I may, while Mr. Wine is thinking about this, at the moment, I think in terms of motions that will be made in this Court, the cart is getting in front of the horse right now, Judge, because I had intended on making motions for psychatric evaluation, which I assume can be made at Luther Luckett.

THE COURT. I would think that we can put all of this ball of wax into one thing and expidite this trial.

MR. HECTUS: The problem being this, Judge...

THE COURT: It seems to be that we've come upon a solution that's for the benefit for both sides.

MR. HECTUS. Well, the problem being this, Judge, and I may not have any objection depending upon how the Court rules.

THE COURT: Well, I'm going to give you a psychatric evaluation.

MR. HECTUS: Yes sir. My motion would have been, though, that with my client being an indigent, I feel like had he had the means for me to go out and hire a private psychatrist or a private psychologist, I could have that person go to the detention center, where David is now, have David tested and have that report made only available to me until such time as I decided

to use it and reveal it to the Commonwealth at that time, so that they can prepare. However, should that report not be favorable, I feel like I would have no obligation whatsoever to turn it over to the Commonwealth, if it was work in preparation for the defense. If he goes to Luther Luckett, I have no objection to any evaluations that are made out there as long as I get to review them and decide whether or not they're going to be used in his defense; because, obviously, he's going to have to give up his fifth amendment right to remain silent in talking to a psychiatrist or a psychologist.

THE COURT: Counsel, you were doing great with me until just that last thing. You're mixing oranges and apples right now. You're suggesting that I should follow the views expressed in a report that's been filed that your client needs, as a juvenile, psychiatric treatment.

MR. HECTUS: Yes, sir.

THE COURT: All right, now, the fact that he goes to Luther Luckett, I'm hopeful they will give him those treatments.

MR. HECTUS: Yes, sir.

THE COURT: If that includes the development of information which is helpful to either you or the Commonwealth, I have nothing to do with that and it's really irrelevant to the issue that's involved here. I would, if you wish, provide in any order, that he will

not be questioned about this offense while he is there so that he won't be pressed to give any information that would be incriminatory about the crime; but I would not give an order that would, in any way, impede other treatment. That is, that would be the only reason for sending him there so that he could be getting treatment; and, therefore it might, and I don't know that this is a detriment to you, but, it might develop in the fact that mental status being determined, to the effect that he is of sufficient mental status to stand trial.

MR. HECTUS: Yes, sir.

THE COURT: It could develop the other way around. But, on the separate issue of... in other words, I would include in the order that he cannot be questioned about the particular occurence. I don't see why that has to be necessary to his treatment.

MR. HECTUS: Well, yes, sir, that was one of my concerns, Judge, and a recent United States Supreme Court case, they reversed the death sentence for that reason.

THE COURT: I'm not going to put you in the position where you're client will be forced to give evidence that might incriminate him. That's the choice you have to made whether there's any questions about a psychiatrist on that ground but, I certainly would not waste the facility of the psychological center by sending him there and then saying that he shouldn't be

in any other way. I think he should be. I think, if you're going to act in the best interest of your client, that this is something that both sides will agree to and we're all showing a rather statesmen like attitude about the situation.

MR. HECTUS: The last problem is, I'm going to have to consult with my client, Judge, because I feel that he's been waived that he may have a right to bail and I don't feel like I can waive that, if he wants to, that's fine.

THE COURT: All right. Go in there and talk to him about that and see what he says.

MR. VIME: Judge, it would be an agreed order then?

THE COURT: That he be confined without bail at Luther Luckett Facility at the Kentucky State Reformatory for the purpose of treatment; but, that he would not be questioned regarding the circumstances of the offenses which are charged against him. I think it satisfies your concerns and it satisfies the other side's concerns.

MR. VIME: I believe it does, your Honor.

THE COURT: Let's hope that he accepts it.

(WHEREUPON, Mr. Hectus left the courtroom for a conference with his client, David Buchanan, and returned. Court continued as follows:)

THE COURT: All right, Court will come to order. Do we need to get your client in here for this?

MR. HECTUS: I don't think so, Judge, as long as the terms are understood that it's for treatment and as far as any evaluation or, I think that should be left for a later motion.

THE COURT: I dictated the order.

MR. HECTUS: That's fine.

THE COURT: You just need to show that it's an agreed order and type it up and I will sign it. I've already dictated it, what do you want, it read back?

MR. HECTUS: Well, yeah, I'd like to know what it says.

THE COURT: All right, read back what I said.

THE COURT REPORTER: (Reading back the Court's order) That he be confined without bail at Luther Luckett Facility at the Kentucky State Reformatory for the purpose of treatment; but, that he would not be questioned the circumstances of the offenses which are charged against him. I think that satisfies your concerns...

THE COURT: That's all, just the order and that's what I want you to type up.

THE COURT REPORTER: Okay.

THE COURT: Just say by agreed order.

A August 17th, 1981.

3496 Q And, that was a psychiatric report that you received, ma'am?

A Yes.

3497 Q Leaving out the portion that was indicated by the Judge, will you read what that report says, ma'am?

A (Witness reading report:) Mental Status Exam regarding David Buchanan. Mr. Buchanan is a 17 year old black male seen on 8-14-81 at the youth center for approximately a period of one hour at the request of Judge Fitzgerald. David's past records were reviewed at DHR Offices in the Legal Arts Building prior to this interview. At the initiation, David was slightly aprehensive about why I was there but the explanation offered seemed to delay his anxiety and he was relaxed. Rapport was reasonably good and eye contact was adequate and David was appropriate inneractionally in the context of the setting. He was neither especially hostile or friendly, mainly tolerant and cooperative. The discussion focused on the hear and now since goal was to ascertain meeting of the 202A criteria or not. He was in good reality contact and reasonable knowledge of current events outside the center and seemed to be functioning in full normal I.Q. range. Short and long term memory appeared intact. There was not evidence of hallucinations or delusions. Affects was...affect was generally shallow without imporia

or disporia. He seemed somewhat optimistic about the outcome of the charges pending against him. No suicidal obviation is present, although, David states at times he has been very angry at certain people, staff at the center and thought about hurting them. David was not especially anxious or restless except initially and seemed overall relaxed. And, it's signed by Robert Ryan, M.D.

3498 Q Does that complete, ma'am?

A Yes.

3499 Q Are there any other later psychological or psychiatric reports subsequent to that one of August 21st, ma'am?

A No.

3500 Q All right. Thank you very much, ma'an.

MR. JASMIN: I have no further questions.

MR. HECTUS: Judge, I have a couple of questions on re-direct.

THE COURT: All right.

REDIRECT EXAMINATION

QUESTIONS BY MR. HECTUS:

3501 Q Miss Elam, at the time of that report, David had been in custody at the detention center for some seven months, had he not?

A Yes.

Short term auditory and visual memory skills are impaired. David has extremely limited capacity for insight. Judgment is impaired. Inneractions with peers is likely to be extremely superficial and very guarded. David uses the psychological defense and projection, denial of rationalization and isolation extensively. He will be easily lead by other more sophicated delinquents or youths. He has very little inner personal skills and is likely to be seen by other youth as a pawn to be used. David's human figure drawings are extremely bazaar. Combined with his flat affect and depressed mood, as well as, other suggestions of a cognity (inaudible) order, it is felt that this individual has potential for developing a full-blown schizophrenic disorder. At the present time, at least, he is extremely mistrustful, suspicious and even paranoid. He is in need of on going extensive mental health intervention in addition to a highly structured but minimally stressful, from a psychological point view, residential environment. In view of the presence of extreme unmet dependency need, early sustained frustration and minimal success in almost any endeavor, there exists the strong probability that underlying considerable passitivity and withdrawal is extensive anger and perhaps even rage. Thus, under the proper circumstance, David could be expected to be dangerous with respect to acts against other persons. While this

(3)

No. 85-5348

In the Supreme Court of the United States

OCTOBER TERM, 1986

DAVID BUCHANAN, PETITIONER

v.

COMMONWEALTH OF KENTUCKY, RESPONDENT

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF KENTUCKY

JOINT APPENDIX

C. THOMAS HECTUS *
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PETITION FOR CERTIORARI FILED AUGUST 12, 1985
CERTIORARI GRANTED MAY 27, 1986

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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

DATE	DOCKET ITEM
November 5, 1981	David Buchanan indicted for murder and other offenses.
February 25, 1982	David Buchanan moves the Court to bar "death qualification" of jury at guilt/innocence phase and/or for separate juries for guilt and punishment with no "death-qualification" of the guilt/innocence jury.
March 2, 1982	Prosecution responds to death-qualification motions.
March 4, 1982	David Buchanan was reindicted by a Jefferson County Grand Jury for murder, robbery, rape, sodomy and kidnapping.
March 9, 1982	Pre-trial hearings. Challenge to "death-qualification" rejected.
July 15, 1982	David Buchanan moves to preclude death as punishment.
July 28, 1982	Capital portion of indictment dismissed as to David Buchanan upon agreement of Commonwealth.
August 2-13, 1982	David Buchanan convicted and given maximum available sentences by a "death-qualified jury: (over his objection) Life, 20, 20, 20 (to be served consecutively).
September 17, 1982	David Buchanan sentenced to life and 60 years imprisonment. Final judgment entered.
June 13, 1985	Supreme Court of Kentucky affirms David Buchanan's convictions and sentences.

THE COMMONWEALTH OF KENTUCKY
JEFFERSON CIRCUIT COURT
CRIMINAL DIVISION

MARCH TERM A.D., 1982

82CR0406-3

THE COMMONWEALTH OF KENTUCKY

Against

KEVIN STANFORD
DAVID BUCHANAN

1—MURDER (BOTH)
KRS 507.020 Capital Offense
Death or 20 years to Life

2—ROBBERY I (BOTH)
KRS 515.020 Class B Felony
10 to 20 years
COMPLICITY
KRS 502.020

3—RAPE I (BUCHANAN)
KRS 510.040 Class B Felony
10 to 20 years

4—SODOMY I (BOTH)
KRS 510.070 Class B Felony
10 to 20 years

5—RECEIVING STOLEN PROPERTY OVER $100
KRS 514.110 Class D Felony
1 to 5 years (Stanford only)

6—KIDNAPPING (Buchanan only)
KRS 509.040 Class B Felony
10 to 20 years

SUPERCEDING INDICTMENT

The Grand Jurors of the County of Jefferson, in the name and by the authority of the Commonwealth of Kentucky, charge:

COUNT ONE

That on or about the 7th day of January, 1981, in Jefferson County, Kentucky, the above-named Defendants, Kevin Stanford and David Buchanan, acting alone or in concert with another, committed the capital offense of murder by intentionally or wantonly causing the death of Baerbel Poore by shooting her with a pistol.

COUNT TWO

That on or about the 7th day of January, 1981, in Jefferson County, Kentucky, the above-named Defendants, Kevin Stanford and David Buchanan, acting alone or in concert with another, committed first-degree robbery by threatening the use of physical force upon Baerbel Poore, while armed with a pistol, and in the course of committing a theft at the Checker Oil Station.

COUNT THREE

That on or about the 7th day of January, 1981, in Jefferson County, Kentucky, the above-named Defendant, David Buchanan committed first-degree rape by engaging in sexual intercourse with Baerbel Poore, through the use of forcible compulsion.

COUNT FOUR

That on or about the 7th day of January, 1981, in Jefferson County, Kentucky, the above-named Defendants, Kevin Stanford and David Buchanan, acting alone or in concert with another, committed first-degree sodomy by engaging in deviate sexual intercourse with Baerbel Poore, through the use of forcible compulsion.

COUNT FIVE

That on or about the 7th day of January, 1981, in Jefferson County, Kentucky, the above-named Defendant, Kevin Stanford, committed the offense of receiving stolen property by having in his possession property, of the value of $100 or more, that had been stolen from the Checker Oil Station.

COUNT SIX

That on or about the 7th day of January, 1981, in Jefferson County, Kentucky, the above-named Defendant, David Buchanan, committed the offense of kidnapping when he unlawfully restrained Baerbel Poore against her will, with intent to advance the commission of a felony, to-wit: murder.

AGAINST THE PEACE AND DIGNITY OF THE COMMONWEALTH OF KENTUCKY.

A TRUE BILL

/s/ Jonathan P. Westbrook
Foreman

JEFFERSON CIRCUIT COURT
DIVISION NINE (9)

No. 81-CR-1218

COMMONWEALTH OF KENTUCKY, PLAINTIFF

vs.

DAVID BUCHANAN, DEFENDANT

Filed: February 25, 1982

MOTION TO PRECLUDE "DEATH QUALIFICATION" OF JURY DURING VOIR DIRE AT GUILT-INNOCENCE PHASE OF TRIAL

* * * *

Comes the defendant, David Buchanan, by counsel, and moves this Court to preclude the Commonwealth's Attorney from "death qualifying" the prospective jurors during voir dire at the guilt-innocence phase of the trial. In support of this motion, defendant states the following:

1. The defendant is charged with a capital offense and will be tried by a jury.
2. In the course of voir dire, the Commonwealth's Attorney is expected to ask prospective jurors if they are conscientiously opposed to capital punishment.
3. The Commonwealth's Attorney is expected to further question and to challenge for cause any potential juror who responds in the affirmative to said question and in addition would not vote for the death penalty under any circumstances.

4. Such use of the "death-qualification" voir dire violates the defendant's right to an impartial jury drawn from a fair cross-section of the community under the Sixth and Fourteenth Amendments to the United States Constitution, in that it excludes from the jury an identifiable segment of the community opposed to the death penalty.

5. Such use of the "death-qualification" voir dire results in a jury which is biased in favor of the prosecution and therefore violates the defendant's right to a fair and impartial trial under the Sixth and Fourteenth Amendments to the United States Constitution (See attached exhibits).

6. Because a bifurcated trial is required in cases where the death penalty may be imposed under KRS 532.025(1)(b), application of the "death qualification" voir dire to the potential jurors at the guilt-innocence phase of the trial cannot be justified by any State interest. Any legitimate interest of the state regarding punishment can be protected during the *sentencing* portion of the trial.

7. Use of "death-qualification" voir dire violates the defendant's right to equal protection of the law under the Fourteenth Amendment to the United States Constitution since it arbitrarily singles out capital cases as cases in which the State is permitted to exclude potential jurors because of their views on punishment.

8. If this Court restricts voir dire by the defense on the issues of punishment but allows use by the state of "death-qualification" voir dire, thereby affording the state an advantage in jury selection, defendant will be deprived of his right to due process of law under the Fourteenth Amendment to the United States Constitution.

WHEREFORE, defendant moves this Court to preclude the "death-qualification" of the jury during voir dire at the guilt-innocence phase of the trial.

Respectfully submitted,

/s/ C. Thomas Hectus
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(502) 585-2100
Assigned Counsel for Defendant

• • • •

JEFFERSON CIRCUIT COURT
DIVISION NINE (9)

No. 81-CR-1218

[Title Omitted in Printing]

Filed: February 25, 1982

MOTION FOR SEPARATE JURIES FOR GUILT-INNOCENCE AND SENTENCING PHASES WITH PROVISO THAT IN THE SELECTION OF GUILT-INNOCENCE PHASE JURY NO REMOVAL FOR CAUSE BE ALLOWED OF JURORS WHO ARE NOT "DEATH QUALIFIED" UNDER *WITHERSPOON v. ILLINOIS*

Comes the defendant, David Buchanan, by counsel, and moves this Court to order that one jury be selected and utilized to decide the issue of guilt in the above-captioned action and, if necessary, another jury selected and utilized to fix punishment in the capital sentencing portion of the trial, with the proviso that this Court during the selection of the guilt phase jury preclude the removal for cause of potential jurors who are irrevocably committed, before the trial has begun, to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceedings. The reasons for this motion are delineated below.

1. In the event that this Court overrules the defendant's motion to preclude removal for cause of jurors who are not "death qualified" under *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968), this Court should on the basis of the scientific studies attached to that motion authorize the use of separate juries for the guilt-innocence and sentencing phase with the requirement that during the selection of the guilt-innocence

phase jury no challenges for cause be allowed on the ground that the juror is not "death qualified" under *Witherspoon*.

2. The scientific studies attached to the previous motion conclusively demonstrate that jurors who are in favor of capital punishment are "authoritarian types," and are more likely both to convict and to give greater sentences. Thus, the exclusion from the jury of an identifiable segment of the community who are opposed to the death penalty violates the defendant's right to an impartial jury from a cross section of the community. Such a procedure deprives the defendant of his rights to due process of law and to a fair and impartial jury under the Sixth and Fourteenth Amendments of the federal constitution, and Section 11 of the Kentucky Constitution.

3. In *Witherspoon v. Illinois, supra*, the United States Supreme Court recognized that even if the State had excluded only those prospective jurors who stated in advance of trial that they would not even consider returning a verdict of death, "a defendant convicted by such a jury in some future case might still attempt to establish that the jury was less than neutral with respect to *guilt*." *Id.*, 88 S.Ct. at 1776 N. 18. "If he [the defendant] were to succeed in that effort, the question would then arise whether the State's interest in submitting the penalty issue to a jury capable of imposing capital punishment may be vindicated at the expense of the defendant's interest in a completely fair determination of guilt or innocence—given the possibility of accommodating both interests by means of a birfurcated trial, *using one jury to decide guilt and another to fix punishment*." *Id.*, 88 S.Ct. at 1776 N. 18. (Emphasis added).

4. Kentucky requires by statute that the death penalty may only be imposed in a bifurcated proceeding. KRS 532.025. Consequently, since the state legislature has already instituted a bifurcated trial procedure in death penalty cases, there is virtually no justification for allowing a single "death qualified" jury to both determine the

issue of guilt and fix the punishment in view of the potential for prejudice to the defendant.

5. The feasibility of this motion is demonstrated by the procedure delineated in the persistent felony offender sentencing statute. Under KRS 532.080(1), persistent felony offender sentencing must be conducted at a bifurcated proceeding. However, the sentencing portion of the proceeding "shall be conducted before the court sitting with the jury that found the defendant guilty of his most recent offense *unless the court for good cause discharges that jury and impanels a new jury for that purpose* (emphasis added).

Surely, if a different jury may be empaneled for the sentencing phase of a persistent felony offender trial, then a second jury may be empaneled for good cause under Kentucky's death penalty statute.

WHEREFORE, this Court should grant this motion and order that one jury be selected and utilized to decide the issue of guilt-innocence in the above-captioned action and, if necessary, another jury selected and utilized to fix punishment in the capital sentencing portion of the trial with the proviso that this Court during the selection of the "guilt-innocence" phase jury preclude the removal for cause of potential jurors who are "irrevocably committed, before the trial has begun, to vote against the penalty of death regardless of the fact and circumstances that might emerge in the course of the proceedings.

Respectfully submitted,

/s/ C. Thomas Hectus
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Assigned Counsel for Defendant

• • • •

JEFFERSON CIRCUIT COURT
NINTH DIVISION
No. 81CR1218

[Title Omitted in Printing]

Filed: March 2, 1982

RESPONSE TO MOTION TO PRECLUDE "DEATH QUALIFICATIONS" OF JURY DURING VOIR DIRE AT GUILT/INNOCENCE PHASE OF TRIAL

Comes the Commonwealth of Kentucky, by counsel, Ernest A. Jasmin, Assistant Commonwealth's Attorney for the 30th Judicial District of Kentucky, and for its answer to the Motion to Preclude "Death Qualifications" of Jury During Voir Dire at Guilt/Innocence Phase of Trial states as follows:

That defendant's motion is contrary to current law in this Commonwealth which indicates that a juror who will not follow the law can legitimately be struck. Further, that the motion is contrary to the law currently governing capital cases as laid out in *Witherspoon v. Illinois*, 391 U.S. 510.

Wherefore, the Commonwealth moves this Honorable Court to overrule the motion of defense counsel to preclude death qualification of jury during voir dire at guilt/innocence phase of trial.

Respectfully submitted,

DAVID L. ARMSTRONG
Commonwealth's Attorney

By /s/ Ernest A. Jasmin
ERNEST A. JASMIN
Assistant Commonwealth's Attorney

• • • •

JEFFERSON CIRCUIT COURT
NINTH DIVISION

EXCERPTS FROM TRANSCRIPT OF PRE-TRIAL HEARING MARCH 9, 1982

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[10] THE COURT: Well, in accordance with Weatherspoon, I'm going to [11] permit you to ask by individual voir dire one question and one question only. And, that is whether they are philosophically or religiously an alterably opposed to the death penalty under any circumstances. That's about it. We're not going to be involved in any kind of a brainwashing procedure for either side.

MR. JASMIN: Judge, we're not going to be involved in a brainwashing situation as such. I think what we need to look at . . . when we look at Weatherspoon we look at the controling cases in Kentucky, it becomes, for the most part, if they say we're opposed to it we have a second question which the Commonwealth would be required to ask and that is, whether or not they would be opposed to it in this or any other case regardless of the facts. So, if they are opposed, the Commonwealth still has to . . .

THE COURT: I thought we both said the same thing.

MR. JASMIN: Well, you said one question and one question only, and all I'm saying, Judge, is that the requirements under Weatherspoon v. Commonwealth [12] would be the Commonwealth at least ask one more after that.

THE COURT: Well, I didn't see any difference between my question and yours, Ernie.

MR. JASMIN: Well, in my eyes we understand. We understand each other.

THE COURT: Well, I know you all want some individual voir dire on some questions, too. Whatever has

to be individual voir dire by you all, whatever I agree can be individually voir dired by you all, is going to be much less than you're requesting and will be done at the same time. I'm not just going to call people in two or three at a time for individual voir dire. So, whatever questions are asked, will be extremely limited. I'm going to ask one individual voir dire. Now, what did you want to say?

MR. HECTUS: Well, Judge, I have a question from the statement of Mr. Jasmin that the Commonwealth was going to be allowed one question and one question only. Are you overruling my motion to not Weather-[13] spoon the jury during the guilt or innocence stage or prior to the guilt-innocence stage?

THE COURT: Well, we're going to get to that later on. Everything I say is tentative.

MR. HECTUS: Okay.

THE COURT: Let me say this, I have read your motion and I'm predisposed against you on the basis of the fact that everything that you suggest is rather unique and is largely supported by general constitutional arguments rather than specific cases. I do not intend to make a positive ruling against you until you've had a chance to orally argue what you want to say. In other words, I'm not going to foreclose you from an opportunity to persuade me. I've got to tell you that I'm momentarily unpersuaded by your brief, okay?

MR. HECTUS: Yes, sir.

MR. JASMIN: Which motions are those, Judge?

MR. HECTUS: The question to preclude Weatherspoon . . .

THE COURT: There are [14] two different motions. He wants a motion to preclude Weatherspoon, you've got a lot of motions really. One of them is that you be precluded from asking the Weatherspoon question until after the guilty or not guilty phase of the trial, and how that would work mechanically, is very difficult except that Mr. Hectus seems to think it could work . . . we

could pick a new jury for the sentencing phase as exists as a remote possibility. I've never seen it occur. It exists in a remote possibility in a PFO situation, haven't you read that one?

MR. JASMIN: Judge, I have read that one.

THE COURT: It shows a lot of creativity, you ought to read it.

MR. JASMIN: It shows a lot of creativity, but I think it also shows an absence of sound case law.

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[16] MR. SHAKE: Your Honor, on behalf of Mr. Stanford I have filed a motion for individual voir dire. Is it the Court's position that we will be . . . we will have an opportunity for rehabilitation when the Commonwealth questions the jurors, the prospective jury?

THE COURT: Well, you cited Irvin versus Dowell, one of the two do and what it says in Irvin versus Dowell is that rehabilitation is somewhat ridiculous. I mean, when a guy says that he is unalterably opposed under any circumstances to giving the death penalty or if he says in the other way, that he is unalterably opposed under any circumstances to not giving the death penalty, if I were to let Mr. Jasmin then ask, well could you put aside your own personal beliefs and give the death penalty anyway, you would be the first to holler, Jim. I have a lot of problem with rehabilitative questions as pure sacristy, I really do. I think the questions ought to be asked in the first place in such a clear manner that only a person who is unalterably opposed [17] under any circumstances would be excluded.

MR. JASMIN: Judge, I think that . . .

THE COURT: I don't think rehabilitation cures anything in my mind. If a guy says that he is unalterably opposed to giving the death penalty and you then got him to say that he would put aside his own personal opinion and follow the law, I would not know what to believe about the state of that man's mind.

MR. SHAKE: Well, it's a tough question to ask any person just point blank whether they would give the death penalty.

THE COURT: That's why I think it has to be worded very categorically. You know, the kind of language like I've already used. I mean, there isn't a lot of people that are going to say that they are unalterably opposed under any circumstances to giving the death penalty. As I see Weatherspoon, that's the only kind of people that Mr. Jasmin has a right to exclude for cause. The mere fact that they don't like [18] the death penalty, that they have a lot of reservations about giving the death penalty, that they would consider, as a negative factor the factor that these people are so young, my preliminary opinion would not to let Mr. Jasmin ask those kinds of questions.

MR. JASMIN: Judge, I can assure you I have no intention of asking that type of question.

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[31] MR. HECTUS: This is not a divorce case. I understand in a divorce case that many people think their lives are coming to an end, but in this case the Commonwealth is literally trying to attempt that. I think we're entitled to some consideration because it is a capitol case.

THE COURT: Well, I understand that. I intend to be very liberal about the subject of excusing people for cause. As I told Jim, I don't put a great deal of stock on rehabilitation. I don't intend to go behind people that if somebody on the jury has said something or indicated some sort of bias, I don't intend to go behind that and ask if you can put your personal opinion out of the way and be fair about that. I've had, well, probably Jim's heard me speak about it. I have an inherent suspicion of rehabilitation. So, people will be excused for cause without being rehabilitative . . .

• • • •

[45] MR. HECTUS: Judge, I have two other selection-related motions. One being a motion for separate jurors

for the guilt-innocent phase and the motion to preclude and the sentencing phase and the second motion being to preclude death qualification prior to the guilt-innocent phase. And, Judge, I submitted a somewhat lengthy exhibit and I don't know if the Court has had the opportunity to read it or not.

THE COURT: Yeah, I read it. I wouldn't say that I studied it, but I read it.

MR. HECTUS: Well, Judge, I can't say that I studied it because I'm not a statistician, but I think the conclusions are such for a layman to at least read and digest, and I would submit that this motion is based upon Weatherspoon itself since there was some language in Weatherspoon to the effect [46] that they were not going to foreclose the question as to whether, at some point in the future, that a litigant could show that Weatherspoon would tend to bias the jury during the guilt or innocent phase. And, I think this study by Diesel definitely shows that Weatherspooning a jury, you end up with a jury first of all, that is not a fair cross-section of the community, because it eliminates, per se, that segment of the community that's opposed to the death penalty. But more important than that, a Weatherspooned jury . . . the study also shows that a Weatherspooned jury is prosecution proned. And, I think that that impinges upon the defendant's right to due process in that he's being denied a right to a fair trial by an unbiased jury and impinges upon his right to equal protection, because capitol cases have beeen singled out for a Weatherspoon jury, whereas other cases are not. And, I think that there is an easy solution to the problem, and I'd liken it to a PFO situation where, for good cause, a judge can impanel a second jury for sentencing. The jury can do that [47] and death sentencing jury as it can in PFO sentencing, and in the event that the Court does that, then there's absolutely no need to Weatherspoon the jury prior to guilt or innocence phase.

THE COURT: You're saying that after the jury has tried the case and decided the guilt or innocence phase of

the case, that they would then be, for the first time, presented the Weatherspoon question?

MR. HECTUS: Well, actually, Judge, what I was asking for was a separate jury, but yeah, that jury could be Weatherspooned in the event that somebody has scruples against the death penalty such that they couldn't sit, I guess, you'd have to impanel different jurors or a different jury panel, but in any event, I don't think that it's a problem that can't be resolved. I would submit under Weatherspoon that this study was exactly the kind of a study that was contemplated by the Court in Weatherspoon and that I am adopting to show that that qualification does not apply to the death penalty. [48] THE COURT: What do you say about it, Mr. Shake?

MR. SHAKE: Your Honor, we're opposed to a second jury. We don't want two juries. We don't want a separate penalty phase. I don't know that there would be any way, you know, you could foreclose Weatherspooning the first jury before the guilt phase. I don't think that would be possible, because if one or two or more of them were intent on it, then, in effect, we would have at least a partial second jury and we would be opposed to that.

THE COURT: I think it would be unconstitutional. I mean, I think that the law clearly contemplates, except in the unique situation of persistent felony offender, which is a status offense as opposed to a penalty, it really is a separate penalty enhancing the penalty because of status, and I don't think that the question of whether aggravating circumstances exists that would justify the death penalty. I just don't think that that is the equivalent of a persistent felony offender situa-[49] tion.

MR. HECTUS: Well, in that effect, Judge, I would ask that you not Weatherspoon the jury at all.

MR. JASMIN: Judge, the Commonwealth's position is, number one, with reference to PFO's, the reason you can do it with different jurors is because I think number

one, the statute says so. In this instance, the statute makes no provisal for setting up another jury. It says after that penalty phase the judge shall instruct the jury. The jury, in the Commonwealth's mind's eye means the jury which has heard the case.

THE COURT: Well, I think you're right, Mr. Jasmin, I think you're right.

MR. JASMIN: All right.

THE COURT: I've really got to overrule those motions. You're bringing up some unique new creative kind of principles of law, Mr. Hectu-, and I think they address themselves . . . if you want to strike new ground, I think that addresses itself to the appellate Court, not to the trial court . . .

* * * *

JEFFERSON CIRCUIT COURT
DIVISION NINE (9)

No. 82-CR-0406

COMMONWEALTH OF KENTUCKY, PLAINTIFF

vs.

DAVID BUCHANAN, DEFENDANT

Filed: July 15, 1982

MOTION TO DISMISS
CAPITAL PORTION OF INDICTMENT

Comes the defendant, David Buchanan, by counsel, and respectfully requests this Court to dismiss the capital portion of the indictment herein, and order that Count 1 (murder) be prosecuted as a Class A felony. As grounds therefore, defendant states as follows:

1. Defendant David Buchanan has been charged with murder, in violation of KRS 507.020. By its own terms, murder in this Commonwealth is a capital offense without regard to its commission either intentionally or wantonly. The Commentary to KRS 507.020 states that:

> If a felony participant other than the defendant commits an act of killing, and if a jury should determine from all the circumstances surrounding the felony that the defendant's participation in that felony constituted wantonness manifesting extreme indifference to human life, he is guilty of murder under KRS 507.020(1)(b).

2. Defendant David Buchanan submits that, even though under the above circumstances, a defendant *may* be guilty of murder such defendant can constitutionally be subject to punishment only as a Class A Felony, i.e., imprisonment rather than death.

3. When the Commonwealth presented its case to the grand jury, Detective Walter Tangel testified that it was Kevin Stanford, *not* David Buchanan, who murdered the victim by shooting her with a pistol. The Commonwealth's proof then, is that David Buchanan is a "non-trigger man."

4. The Commonwealth's evidence will also show that a third person, *not* David Buchanan, supplied Kevin Stanford with the weapon used to perpetrate the murder. This weapon was supplied by a third co-defendant, Troy Johnson, who admitted his guilt to the charged offenses in Juvenile Court in return for his testimony. In addition to stating that he procured a gun at the home of his brother (without his brother's knowledge or consent), Troy Johnson also testified that there was no plan or intention to kill the victim:

Q: When did you see David on January 7?

A: In the late afternoon, in the morning.

Q: Where was he and where were you when you were together?

A: I went and picked him up.

Q: At his house?

A: Yes.

Q: And came over to where?

A: Old Third.

Q: But where did you go after you picked him up?

A: Back out to my brother's house.

Q: Okay and where is that located?

A: Out Newburg.

Q: How long were you kids together that day—that afternoon or whenever it was?

A: How long were we together?

Q: Uh-huh.

A: We were together all day.

Q: Okay, did you discuss anything with regard to the Checker Oil Station?

A: Yes.

Q: Answer the question.

A: Yes, sir.

Q: What did you discuss?

A: How easy it was

Q: How easy it was for what?

A: To rob it.

On cross-examination, Troy Johnson acknowledged that there was no plan to kill anyone:

Q: Alright, when David came to your house the day this happened isn't it true that when David asked you to get the gun that he assured you that nobody would get hurt?

A: Yes, sir.

Q: So both you and David thought that the gun wasn't going to be used, isn't that true?

A: Yes, sir.

Q: And as far as you knew and as far as David knew you were going out to rob the gas station according to your testimony?

A: Yes, that's right.

Q: So David never spoke about anything else?

A: No, sir.

Q: Especially shooting anybody?

A: Yes, sir.

5. Recently, the United States Supreme Court held that a defendant found guilty of "felony murder" (i.e., what would amount to "wanton murder" in this Commonwealth) could not be constitutionally subjected to a sentence of death. In *Enmund v. Florida*, —— U.S. ——, —— S.Ct. ——, —— L.Ed.2d (July 2, 1982), the United States Supreme Court vacated Enmund's sentence of death because he was not the trigger man and did not have an intent to kill the robbery victim. The Supreme Court found that it was constitutionally impermissible under the Eighth Amendment to treat those who kill, in the same manner as those who neither kill nor intend to kill.

6. This court has the inherent authority to preclude the Commonwealth from submitting the case to the jury on the issue of capital punishment. Recently, the Supreme Court of Kentucky affirmed the action of this court in so doing. *Commonwealth of Kentucky v. William Bonnie Smith*, Ky., —— S.W.2d —— (June 15, 1982). In *Smith*, this Court found that it would be unconstitutional to sentence Smith, the "non-trigger man," to death since it would be disproportionate under the facts of that case. Recognizing that the ultimate sentencing power as to capital punishment lies with the trial court, and not the jury, the Kentucky Supreme Court stated that "[i]t therefore becomes self-evident that the court should not be required to entertain an exercise in futility and preside over a hearing of any duration when it will ultimately decide, for as significant a reason as expressed in this record, that such recommendation by a jury would have been, in the trial court's opinion, 'disproportionate.'" *Smith, supra* at p. 5.

7. Defendant David Buchanan submits that to subject him to a sentence of death for an offense for which he was neither the trigger man nor had a shared intent

to murder would be cruel and unusual punishment. Additionally, because, as to the offense of murder, David Buchanan does not stand in a significantly different position than that of Troy Johnson, who was committed to a Department of Human Resources boy's camp and since released, a sentence of death for David Buchanan would be disproportionate. Accordingly, to engage in a lengthy sentencing hearing, assuming arguendo that David Buchanan were convicted of murder, would be an exercise in futility because any sentence of death would be constitutionally impermissible.

WHEREFORE, defendant David Buchanan respectfully requests this Court to exercise its inherent authority and dismiss the capital portion of the indictment, and further, to direct the Commonwealth to proceed as to the murder count as a Class A Felony.

Respectfully submitted,

/s/ C. Thomas Hectus
C. THOMAS HECTUS
Gittleman & Barber
800 Marion E. Taylor Building
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(502) 585-2100
Assigned counsel for Defendant

• • • •

NO. 82-CR-0406

JEFFERSON CIRCUIT COURT
DIVISION NINE (9)

COMMONWEALTH OF KENTUCKY

PLAINTIFF

VS.

ORDER

DAVID BUCHANAN

DEFENDANT

* * * * *

Upon motion of the defendant, and the Court being sufficiently advised,

IT IS HEREBY ORDERED that the capital portion of the indictment herein, be, and it hereby so, dismissed. It is further ordered that Count 1 (murder) be prosecuted as a Class A Felony.

Comm. Has No Objection

Charles L. Leibson

HON. CHARLES LEIBSON, JUDGE
JEFFERSON CIRCUIT COURT
DIVISION NINE (9)

DATE: _____

JEFFERSON CIRCUIT COURT
NINTH DIVISION

EXCERPTS FROM TRANSCRIPT OF TRIAL
AUGUST 2-13, 1982

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[33] THE COURT: Well that occurred to me after . . . last Monday after motion hour. I had Mr. Hectus and Mr. Buchanan. . .

MR. JASMIN: Jasmin.

THE COURT: Mr. Jasmin, you're prettier than Buchanan, anyhow. See, that's why I don't want to have that microphone on. I'm constantly prone to say something like that. Anyhow, you know, but that's besides the point. That's just a joke. At that hearing, Mr. Jasmin conceded very openly and to his credit, I mean, that he was definitely, positively taking a position, a legal position obviated the factor, and, his legal position is that as far as the Commonwealth is concerned, Stanford is the trigger man and Buchanan is not. And, there is, of course, no way that that precludes from arguing the contrary. You can argue the contrary all you want. They have the wrong guy, but that is the legal position of the Commonwealth. It's a judgmental admission, if you please, that's been taken by the Commonwealth, that's why it's not an issue in the facts of this case.

MR. JASMIN: The Commonwealth's position is that all of the evidence we have is pointed to the fact that Kevin Stanford was the trigger man.

THE COURT: So, that's where [34] I'm at and I overrule your motion. I'm glad you put it up, not that the Court has made any judgments about who should be tried death penalty or non death penalty, but as expressed by the Commonwealth; again, Stanford for the death penalty because they consider him to be the trigger man and they are going to prosecute against Buchanan for life imprisonment because they do not consider him to be the trigger man.

MR. JEWELL: Okay, our problem is, if that is the case we felt it should have been decided in the penalty phase or on a motion of the Commonwealth to ammend . . . . a motion as opposed to Buchanan. . . a motion to exclude thedeath penalty based on factual issues.

THE COURT: Well, you're overruled. Cases are changed all the time. For example, every murder case is almost always charged as a capital case. Then, the Commonwealth has to come forward with aggravating circumstances then . . . even so, that doesn't apply here, then they change the case from a capital case to a non capital case.

MR. JEWELL: We have renewed our severance motin as well. We feel we prejudiced by having to try a capital case with a non capital co-defendant.

THE COURT: Mr. Jewell, I overrule you on that, too.

[35] MR. JEWELL: We also have one motion which the Court have under submission to exclude the death penalty based on the defendant's age which has not been finally ruled on.

THE COURT: I thought I had ruled on that.

MR. JEWELL: You remember you want to wait to see if the law is repealled.

THE COURT: You're right, I told you how I was going to rule on it.

MR. JEWELL: And, now the law was merely delayed, so I filed a follow-up motion to that back in June and the Court took it under submission.

THE COURT: My position is that when the legislature moved that to 1984, that will be delayed then, too, in my opinion. So, you're overruled on that, too, the case will be tried as a capital case.

MR. HECTUS: I had, at one time, filed a motion for separate juries for the guilt or innocent portion of the trial and the penalty phase of the trial. Of course, the basis of my motion was that a death qualified jury is

prosecution prone according to studies that I appended to my motion and I would like to renew my motion because I now have a client that's not even subject to the death penalty but is going to be tried by a death qualified Jury.

[36] THE COURT: I'm going to overrule that, we've been through all of that.

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[38] THE COURT: . . . I intend to make it my ruling that I'm going to ask all of the individual voir dire questions of the Jury.

MR. JASMIN: Judge, at this point, I'm going to tender to the Court the same item I tendered to it in the Horton case, why the Court shouldn't ask all of the individual voir dire questions based upon *Gary versus Commonwealth*, it's an excerpt of page 199 of the prosecutor's hand book published by the office of the Attorney General.

THE COURT: Well, I'll tell you what I intended to ask the Jury. They are the same questions that I asked all of those times in the Horton case. Do you have any personal conviction against imposing the death penalty, such that you could not consider it under the circumstances in this or in any other case and regardless of what the evidence may be? . . .

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[63] (WHEREUPON, at this point the Court adjourned to the juryroom for the individual voir dire procedure and Court continued as follows:)

MR. JEWELL: Before we get started, Judge, I understand we have a continuing objection on not allowing the attorneys to ask rehabilitation on Weatherspoon questions and we'd like the record to show . . . well, we'll enter our objection to anybody being struck for cause on the Weatherspoon case, which we have stated earlier. We feel it denies us fair representation of the community. So, when that happens, I'll just say note my objection.

THE COURT: I'm sure Mr. Hectus joins in that objection.

MR. HECTUS: We will, your Honor, same given reasons.

THE COURT: You're not even involved at this point but I do want to say this much, the basic ground rules, of course, Mr. Jewell, Mr. Shake, I don't want both of you talking on any particular point. Whoever's going to do the talking, that's fine, you can change for the next witness or the next Juror whenever you like, but only one of you can talk on any particular person that's been questioned in any respect and I do think [64] we ought to agree on the order in which you will speak in order to expedite the trial; and I do think we ought to agree, again in order to expedite the trial, that whenever any defendant makes an objection on behalf of that defendant, that the other defendant should automatically have the same objection so they don't have to, we don't have to repeat, okay? In other words, the other set of attorneys don't have to speak unless he has something to add that needs to supplement what's already been said. We do want to get away from, you know, repeating the same thing over and over again.

MR. HECTUS: For example, I don't have to move to join the objection?

THE COURT: Exactly.

MR. HECTUS: So, you're going to assume I join it unless I say otherwise?

THE COURT: Of course, presuming that the objection either defendant makes is preserved automatically for the other defendant as well.

MR. JASMIN: I think that would be proper because as I see it, at this point, Buchanan is not involved in the death qualification.

THE COURT: We're going to be talking about more than just Weatherspoon, we're going to be talking about some other things, too, all we said so far follows *Carolina versus Allen*. . . .

* * * *

[EXCLUSION OF JUROR ASPATORE]

[69] MISS ASPATORE: Aspatore.

THE COURT: All right. Miss Aspatore, this is a case where the Commonwealth will be demanding the death penalty for one of the defendant's in the case. Now, I'm not asking you in anyway to tell me what your judgment would be in that respect, you understand? You haven't heard any of the evidence on the subject yet. But, I am asking you a questions which is related to whether you could consider it as a possible penalty. That's all my question is; 'do you have any conscientious scruples against imposing the death penalty such that you couldn't consider it, under the circumstances, in this or any other case and regardless of what the evidence may be?

MISS ASPATORE: I would hate to.

THE COURT: That doesn't disqualify you. People naturally would be reluctant to impose the death penalty. That's not the question though, not whether you would be reluctant but whether, because of some religious or conscientious scruples, you know, that it would be just impossible for you to do it regardless of what the evidence might be?

MISS ASPATORE: I don't think I could.

THE COURT: Okay, no matter how bad the evidence was?

[70] MISS ASPATORE: Well, I haven't never been on a Jury before.

THE COURT: Yeah?

MISS ASPATORE: So, I haven't been exposed to this.

THE COURT: But, the only thing, you take your time, I'm not trying to get you to say anything one way or the other. I want you to take your time and think about it. The only way that I would excuse you would be if you told me there would be no possible way that you could give the death penalty in any case regardless of

what the evidence might be and if that's the truth, then of course, you would be disqualified because you would be asked to consider something which you could not do.

MISS ASPATORE: I really think it would be impossible. I just don't think I could give anybody the death penalty.

THE COURT: All right, then I'm going to excuse you as a Juror. You're excused and you're free to leave.

MISS ASPATORE: Thank you.

MR. JEWELL: Note my objection.

THE COURT: You've got that objection automatically for any Juror I excuse for this particular question. . .

* * * *

[85] . . . . and I want to tell you I'm not asking how you would decide this case, you haven't heard any evidence, yet and you should have no opinion about that, about this case. But, what I want to ask you is this: 'do you have any conscientious scruples against imposing the death penalty such that you could not consider it, under the circumstances in this case or in any other case and regardless of what the evidence might be?

MR. CAIN: Would you repeat that for me?

THE COURT: Okay, I want you to think about it and I'm glad to repeat it. Do you have any conscientious scruples, that means standing convictions as a matter of conscious, against imposing the death penalty such that you could not consider it, under the circumstances in this or in any other case and regardless of what the evidence might be?

MR. CAIN: I don't know, you mean, what I think about the dealth penalty, you know, whether somebody is guilty, I could decide when they got the death penalty or not?

THE COURT: Exactly. I'm not asking which way you would decide or would your mind be made up one way or the other?

MR. CAIN: I don't know if I could decide that or not, you know. I don't really believe in the dealth penalty, you know, it would be hard * * *

[EXCLUSION OF JUROR CAIN]

[86] THE COURT: The question goes . . . I don't know that you were listening and I repeated the question because you asked me to repeat it. The question is not whether you would have a hard time in reaching that decision, the question is if you could reach the decision to impose the death penalty if the evidence in the case warranted it.

MR. CAIN: I don't think . . . could I ask you a question?

THE COURT: Yeah.

MR. CAIN: Is that what this case is about?

THE COURT: Yeah.

MR. CAIN: I don't think I could decide that.

THE COURT: Do you think it would be improper, regardless of how serious the evidence might be, impossible for you to decide on the death penalty in this case?

MR. CAIN: Yes, sir.

THE COURT: Okay. Well, then that would disqualify you. So then, I'll release you as a Juror. This is your last day, just go back to the jurypool, okay?

MR. CAIN: I'm sorry.

THE COURT: Okay, I appreciate [87] it. We expect you to answer the questions honestly.

MR. JEWELL: Note my objection.

* * * *

[EXCLUSION OF JUROR EHMAN]

[110] THE COURT: Come right in and have a seat. Are you David Ehman?

MR. EHMAN: Yes.

THE COURT: Am I pronouncing that correctly?

MR. EHMAN: Yes, Ehman.

THE COURT: Mr. Ehman, I just want you to relax.

MR. EHMAN: Okay.

THE COURT: My first question is: 'do you have any personal committment during the next two weeks that would make it very difficulat, as a practical matter, for you to serve on this Jury?

MR. EHMAN: No, sir.

THE COURT: All right. Now, my next question has to do with the death penalty. I'm not asking you in any way how you would decide this case, you haven't heard any evidence, yet, so that's not involved. But, the death penalty is one of the things that you are going to be asked to consider and my question is: 'do you have any conscientious scruples against imposing [111] the death penalty such that you could not consider it, under the circumstances, in this or in any other case and regardless of what the evidence may be?

MR. EHMAN: I don't think I could.

THE COURT: Well, I want to be clear about this now, because, the question is not whether you'd be reluctant or not.

MR. EHMAN: Yeah.

THE COURT: It's perfectly proper for you to serve regardless of whether you would be reluctant or not. The question is: 'would it be impossible for you to consider it anyway, no matter what the evidence might be?

MR. EHMAN: I don't know. I just couldn't see making that kind of decisior. It's kind of hard for me to do.

THE COURT: Again, Mr. Ehman, the fact that it would be hard for you to do wouldn't disqualify you. The only think that would disqualify you is if you tell me it would be impossible for you to do, under the circumstances.

MR. EHMAN: Yes, I think it would be.

THE COURT: Okay, then I'm going to excuse you.

MR. JEWELL: Just note my objection.

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[EXCLUSION OF JUROR ENGLERT]

[113] THE COURT: Now, my next question has to do with the possibility of considering the death penalty in this case.

MISS ENGLERT: Uh-huh.

THE COURT: And, I'm not asking you how you would decide this case, you have heard none of the evidence, yet, and I'm not suggesting anything by my questions, okay?

MISS ENGLERT: Uh-huh.

THE COURT: Do you have any conscientious scruples against imposing the death penalty such that you could not consider it, under the circumstances, in this or in any other case and regardless of what the evidence might be?

MISS ENGLERT: Uh-huh, I think I would have a hard time. I don't think anybody has a right to take somebody's life. I wouldn't vote for the death penalty, I know that.

THE COURT: Well, I want to be very clear about this. If you're telling me, not that you'd have a hard time because that doesn't disqualify you at all. I think you should be reluctant about the death penalty, that certainly is no reason for you not to [114] serve on a Jury. The only thing that would disqualify you is if you tell me that it would be impossible under any circumstances, no matter what the evidence might be, it would be just impossible for you, because of your opinion either religious, philosophical or whatever, impossible in any case to render the death penalty.

MISS ENGLERT: Yes, I think it would be.

THE COURT: Okay. I appreciate you being honest and I will excuse you.

MISS ENGLERT: Okay, thank you.

MR. HECTUS: Note my objection to that last Juror being excused.

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[EXCLUSION OF JUROR ROUNDTREE]

[181] THE COURT: My question is this: do you have any conscientious scruples against imposing the death penalty, such that you could not consider it, in this case or in any other case, and regardless of what the evidence may be?

MISS ROUNDTREE: No, I don't. I would not be able to sentence anybody as far as the death penalty.

THE COURT: Well, okay, now let me pursue this with you a little bit further because I'm sure nobody every asked you that question before.

MISS ROUNDTREE: No, they haven't.

THE COURT: This question has to do with whether you have any religious beliefs, or philosophical convictions or fixed opinions about the subject that would make it impossible for you to consider imposition of the death penalty, not just a question of whether you would be reluctant or whether it would be hard to do to accept that responsibility. It's not a question of whether, you know, it might be personally difficult for you to be involved in a situation. The only question is whether you have religious convictions, or fixed opinions against imposition of the death penalty that you bring with you so that you couldn't possibly consider it.

[182] MISS ROUNDTREE: As far as my religious convictions are concerned, I don't feel that any human being has any right to, you know, to have anything to do with anybody else's life as far as you sentencing them you know, to the death penalty or anything like that.

THE COURT: So you're saying, no matter how bad the evidence was, it would just be impossible for you to do that?

MISS ROUNDTREE: Yes, sir.

THE COURT: All right, I'm going to excuse you as a Juror in this case.

MISS ROUNDTREE: Okay, thank you.

MR. JEWELL: Note our objection.

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[EXCLUSION OF JUROR SEBREY]

[192] THE COURT: Okay. Now, my next question to you has to do with the possible penalties in this case. I do not, by my question, in anyway mean to suggest anything at all about how the case should be decided. We have not heard any evidence, yet.

MISS SEBREY: Right.

THE COURT: But, my question has to do with possible penalties and it is: 'do you have any conscientious scruples against imposing the death penalty, such that you could not consider it, in this case or in any other case, and regardless of what the evidence may be?

MISS SEBREY: I don't believe I could take a life.

THE COURT: Well, let me finish my question.

MISS SEBREY: Oh, okay, I'm sorry.

THE COURT: I want you to listen to all of it, okay?

MISS SEBREY: Okay.

[193] THE COURT: Do you have any conscientious scruples, such that you could not consider it, under the circumstances, in this case or in any other case and regardless of the evidence may be? No matter how bad the evidence may be? I'm asking you a lot more than just whether you'd be reluctant and a lot more than whether it would be difficult for you. I'm asking you whether you have religious or ethical convictions or fixed opinions such that you could not consider it at all?

MISS SEBREY: I still don't believe I should take a life.

THE COURT: What is your answer? That you could not?

MISS SEBREY: No. I couldn't have somebody killed because he killed somebody else.

THE COURT: I don't know that that . . .

MISS SEBREY: Is that what you asked me

THE COURT: Okay, then, since that is something that the Jury will have to consider in this case, we're going to have to excuse you as a Juror. Thank you very

much for coming and answering our questions for us and we appreciate your time.

MISS SEBREY: Okay, thank you.

MR. JEWELL: Note our objection.

THE COURT: All right, we have it in the record.

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[EXCLUSION OF JUROR FRYE]

[247] THE COURT: All right, fine. Now, my next question has to do with the subject of possible penalties that you might have to consider. I want to tell you that I'm not, by my question, suggestion anything at all about how the case should come out. We haven't heard any evidence, yet, do you understand?

MR. FRYE: Yes, sir.

THE COURT: Do you have any conscientious scruples against imposing the death penalty, such that you could not consider it, under any circumstances, in this or any other case and regardless of what the [248] evidence may be?

MR. FRYE: Yes, sir.

THE COURT: Okay, tell me a little bit about that.

MR. FRYE: I just don't think I could do that.

THE COURT: What do you mean by that, what's on your mind?

MR. FRYE: I just don't believe in the death penalty.

THE COURT: Okay. Now, are you saying that you don't believe in it? We're not talking about whether it would be difficult or very serious. We're talking about a religious conviction or personal conviction that you know it would not matter what the proof was in the case, there's no possibility that you would decide for the death penalty. That you couldn't consider it, is that what you're telling me?

MR. FRYE: Yes. Well, I mean, I was taught and brought up in the church and everything, I mean, it's wrong for one man to take another man's life, it's my theory.

THE COURT: Even if the law provides for that?

MR. FRYE: That's right.

THE COURT: Okay, then, I'm going [249] to excuse you, Mr. Frye, and you can return to the jurypool. Nice to meet you. Thank you.

MR. FRYE: Thank you, sir.

MR. JEWELL: Note our objection.

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[DEFENSE TESTIMONY BY MARTHA ELAM]

[1114] (WHEREUPON, Court was adjourned at approximately 11:40 a.m. and continued as follows at approximately 1:05 p.m.)

THE COURT: All right. Court will come to order. We're now ready to proceed with the defendant's case. I guess Mr. Jewell and Mr. Shake?

MR. JEWELL: We'll rest at this time, your Honor.

THE COURT: All right. Then, Mr. Hectus, may I inquire to you regarding the defendant, Buchanan?

MR. HECTUS: The defendant, David Buchanan, would call Miss Martha Elam.

(WHEREUPON, Miss Martha Elam was sworn to tell the truth, the whole truth and nothing but the truth and testifies as follows:)

DIRECT EXAMINATION:

QUESTIONS BY MR. HECTUS:

3372 Q Miss Elam, as I ask you a question would you please respond and tell the Jury your answer to any particular question. Now, would you state your name for the record, please?

A Martha Elam.

3373 Q Where are you employed?

A Department of Human Resources.

3374 Q What is your position with the Department of Human Resources?

[1115] A I'm a social worker.

3375 Q And, what duties does that entail?

A I work with juvenile delinquents and status offenders that have been committed to the Department through the Juvenile Court until they're 18.

3376 Q All right. Now. . .

THE COURT: Could I ask you to use that microphone? I can't hear you, maybe the Jurors can but I can't. If you hold it about three inches from your mouth. Okay, fine. You said you work with juvenile delinquents and what?

THE WITNESS: And the status offenders that are committed to the Department until the age of 18.

3377 Q What is a status offender?

A Truant or beyond parental control.

3378 Q Now, incident with your job with the Department of Human Resources as a social worker, have you come in contact with David Buchanan?

A Yes.

3379 Q And, what is the nature of your relationship with David?

A I was his community social worker.

3380 Q And, in fact, you still have him open on your case load, is that correct?

A Yes.

[1116] 3381 Q Now, can you tell me or tell the Jury when David was first committed to the Department?

A He was committed to the Department on May the 1st, 1980.

3382. Q And that was for the purpose of residential or institutional placement, was it not, as opposed to home supervision?

A Yes.

3383 Q And, where was David placed?

A He was placed at Danville Youth Development Center.

3384 Q And, do your records show on what date he was placed in Danville?

A May the 12, 1980.

3385 Q On June 3rd, 1980, do your records show that he was evaluated by Carol Schultz and Dr. Michael Neetzel?

A Yes.

3386 Q Miss Elam, I'm going to show you what's been marked as David Buchanan Number 1 and ask you if this is not a true and accurate copy of a report that's contained in your records?

A Yes, it is.

3387 Q Both pages?

A Yes.

3388 Q Now, are you the official custodian of those records?

[1117] A Yes.

MR. JASMIN: Counsel, may I see what you're referring to?

MR. HECTUS: Referring to the copy of the report of Dr. Neetzle.

3389 Q You are the official custodian of these records?

A Yes.

3390 Q Now, is it common for a child, once placed at a DHR treatment facility to be evaluated once he's there?

A Most of the time, yes.

3391 Q And, what would be the purpose of that evaluation?

A Generally to see if the placement, where the child is, is an adequate placement.

3392 Q Now, would you read for the Jury that psychological evaluation that was done on June 3rd, 1980?

A (Witness reading the report) David Buchanan is a 16 year old black male referred for a psychological evaluation by Steve Yonik, Director of the Lakefront Program. The purpose of the evaluation was to aid in determining appropriate placement for David. David was very quiet during the examination and conveyed some-

what of a suspicious attitude. For example, he was slow to respond to questions and test stimuli and frequently demanded that the examiner repeat questions or instructions the second time. When he did respond to test stimuli, he [1118] did not appear to take time to think about his answers. At times, he repeated questions. When performing the picture completion test, David asked what's missing in this before each card. Throughout the session he appeared distant and his affect was flat. He did not smile at any time nor was there much variation in verbal expressions. David's home is in Louisville where he lives with his mother and two younger sisters. According to David, he has no difficulties at home. Although he was arrested on a charge of first degree burglary, he denies having been involved in the incident or in previous incidents for which he was arrested. He resents being placed at the Danville Youth Development Center as he says he did not commit the crime and does not need any help. The Unit Director reports that the family supports the view of David's innocence and is generally hostile toward authoritative figures. Test results: David obtained a full scale I.Q. of 74. Verbal I.Q. of 76 and a performance I.Q. of 75, respectively. These scores fall in the borderline range of intellectual functioning. Among the verbal sub-tests, David is markedly deficient in verbal comprehension. He is moderately to mildly deficient in the other verbal areas. On a performance sub-test, he displayed greater verital ability. He is markedly deficient in awareness of logical sequences and analysis synthesis of non-meaningful material and moderately deficient in ability to distinguish essential [1119] from non-essential details. However, David displayed average ability and rapid visual motor shifting analysis and synthesis of meaningful material. David's response to projected testing suggests an individual with isolated mistrust of others and inner personally deficient. His reproduction of the Bendrick designs are indicative of emotional disturbance. Along with his test behavior and flat affect, his

pattern of tests responses suggest a mild thought disorder. He is likely to deal with his thought disturbance in a socialapathic manner. Although he tends to withdraw from others, when pushed, he becomes hostile. Reccommendations: David emotional disturbance and his resentment of his placement at the Danville Youth Development Center appear to militate against his success in this program. This view is reinforced by the negative attitude of the family toward David's placement here.

3393 Q In effect then, would you agree that Carol Schultz and Dr. Neetzel were saying that Danville was an inappropriate placement?

A Yes.

3394 Q What did the Department do then as a result of that particular psychological?

A He was transferred to Northern Kentucky Center for a 30 day evaluation.

3395 Q And, can you tell the Jury on what date that was?

[1120] A July the 10th, 1980.

3396 Q Approximately four to five weeks after this evaluation?

A Yes.

3397 Q Okay. Was he then evaluated again while he was at Northern Kentucky Treatment Center?

A Yes.

3398 Q And, Northern Kentucky Treatment Center is what sort of an institution?

A It's a treatment facility for emotionally disturbed youths.

3399 Q Now, I hand you a psychological evaluation that is signed by Dr. Robert Nolker and ask you if that's a true and accurate copy of a report kept in your records?

A Yes.

MR. HECTUS: Mr. Jasmin, I'm using Dr. Nolker's psychological.

MR. JASMIN: Thank you.

MR. HECTUS: Judge, at this time, I move Defendant's A into evidence which is the Neetzle psychological.

THE COURT: May I take a look at it please?

MR. JASMIN: Your Honor, approach the bench please?

THE COURT: Come up, gentlemen.

[1121] (WHEREUPON, the following discussion was had at the bench out of the hearing of the Jury:)

MR. JASMIN: Your Honor, if he's going to put that into evidence, I would like to have a copy of it.

THE COURT: You don't have any objection other than that?

MR. JASMIN: Judge, I have an objection to the whole situation. I want to put in an objection, a continuing objection to the whole thing.

THE COURT: You know and I know that I'm not ruling that the records can be put in just simply that they can be read into the record. I'm not ruling that the records can be introduced anymore than the police records or reports. This is nothing but simply a statement from a doctor.

MR. HECTUS: Uh-huh.

THE COURT: There is no basis then if the witness testified in person and then somebody tried to offer his statement about what he had testified to. I don't know any basis for introduction of the written evidence as an exhibit to go back to the jury room.

MR. HECTUS: Because it's a copy of a record upon which she relied on when she made her placements or recommendations.

THE COURT: But, I'm telling you, at least at this time, I'll listen to you and I'll certainly permit

it to be marked and filed with the record but as . . . I don't know what the rule relevant to the admission of records is.

[1122]

MR. HECTUS: I don't think it's any different than the chain of custody that Mr. Jasmin had people testify to.

THE COURT: The difference is that nobody objected, that's the difference.

MR. HECTUS: Judge, I had a continuing objection to all of that until the chain was completed.

THE COURT: You objected to it . . . well, I made my ruling, anyhow, my ruling that as far as these records coming in as such, that I'll reserve a ruling until after the Jury is gone but I'm not going to let you admit it at this point.

MR. HECTUS: Thank you, your Honor.

(WHEREUPON, that concludes the discussion at the bench out of the hearing of the Jury and Court continues as follows:)

QUESTIONS CONTINUED BY MR HECTUS:

3400 Q Now, Miss Elam, would you read for the Jury the psychological evaluation dated August 21st, 1980?

A (Witness reading report) David Buchanan was seen at the request of Jim Mosley, Superintendent of Northern Kentucky Treatment Center. Apparently, David was recently transferred to the Northern Kentucky Treatment Center from the Lakefront Program at Danville. He was not adjusting to that program in terms of the Danville Center in terms of adapting to basis rules, regulations and structure. In addition, his uncle an inmate at Eddyville Penitentiary has apparently filed several legal motions in his behalf. In any event, David is

now at [1123] the Northern Kentucky Treatment Center and is being assessed relative to his current levels of emotional and/or personality function. Since his social and legal history has been detailed elsewhere, it will not be made an intrical part of this report. However, it should be mentioned in passing that he comes from a fairly typical poor urban home in Jefferson County and that he has been in Court on multiple occasions for offenses ranging from theft over $100 to robbery. A recent psychological evaluation found him to be an isolated, mistrustful and depressed individual with a mild thought disorder. Sciopathic or psychopathic characteristics were also noted. Current observations and test results: Since a recent psychological dated June of 1980 was completed, a readministration of an intelligence test was not attempted at this time. Rather, this examiner focused on overall personality function. The Housetree, Person, VanderGestalt and a diagnostic clinical interview were presented and completed at this time. David Buchanan presents as a quiet, rather withdrawn and at least moderately depressed 16 year old black youth. He is oriented for time and place and person. His thinking, however, is extremely simplistic and very concrete. Impulse controls under, even minimal stress, are felt to be very poor. He is not seen as sophisticated but rather as a very dependent, immature, probably pretty severely emotionally disturbed and very easily confused youth. [1124] Short term auditory and visual memory skills are impaired. David has extremely limited capacity for insight. Judgment is impaired. Inneractions with peers is likely to be extremely superficial and very guarded. David uses the psychological defense and projection, denial of rationalization and isolation extensively. He will be easily lead by other more sophisticated delinquents or youths. He has very little inner personal skills and is likely to be seen by other youth as a pawn to be used. David's human figure drawings are extremely bazaar. Combined with his flat affect and depressed mood, as well as, other suggestions of cognity (inaudible) order, it is felt that this individual has potential for developing a full-blown schizophrenic disorder. At the present time, at least, he is extremely mistrustful, suspicious and even paranoid. He is in need of on going extensive mental health intervention in addition to a highly structured but minimally stressful, from a psychological point view, residential environment. In view of the presence of extreme unmet dependency need, early sustained frustration and minimal success in almost any endeavor, there exists the strong probability that underlying considerable passitivity and withdrawal is extensive anger and perhaps even rage. Thus, under the proper circumstance, David could be expected to be dangerous with respect to acts against other persons. While this [1125] has not been a part of his history, it needs to be considered with respect to future treatment and eventual disposition. Diagnosis: Under socialized, digressive disorder conduct . . . conduct disorder and personality disorder, paranoid personality. The possibility exists for regression and psychological function to a full-blown psychotic or schizophrenic state in the future.

3401 Q And, that's signed by Dr. Robert Nolker, Ph.D?

A Yes.

3402 Q Licensed clinical psychologist?

A Yes, uh-huh.

3403 Q And the date of that was August 21st, 1980?

A Yes.

3404 Q Can you tell me what the Department's next involvement was with David?

A Well, at that time, he was admitted for treatment and was to remain there for treatment.

3405 Q And, what date was that that he actually was admitted.

A July the 10th, 1980.

3406 Q Well, that was the date, was it not, that he was actually referred there for evaluation?

A Yes.

3407 Wasn't he admitted for treatment subsequent . . .
A To August the 21st.
3408 Q Pardon me?
[1126] A After August the 21st.
3409 Q What date would that have been?
A August 21st.
3410 Q Do you records actually show what date he was admitted for treatment?
A No.
3411 Q Okay.
MR. HECTUS: I'd like this to be marked as Exhibit C.
3412 Q Miss Elam, I'm showing you a report dated September 26, 1980, titled an interium progress report and ask you whether or not this is a true and accurate copy of a report contained in your records?
A Yes.
3413 Q Okay.
A Yes, yes, it is.
3414 Q So, sometime after August 21st, and before September 26th, David was admitted for treatment at Northern Kentucky Treatment Center?
A Yes.
3415 Q Would you please read to the Jury the document titled interium progress report and dated September 26th, 1980?
A (Witness reading from report:) There have been no major changes in David's overall treatment program. Personal, inner personal adjustments: David continues [1127] to be extremely resistant to all treatment methods utilized thus far. All attempts to motivate David toward self improvement have been unsuccessful. David continues to project a self-deficient image. David has repeatedly denied having any difficulty that he would like to obtain a better understanding of or ability to be able to cope with. David flatly refuses any responsibility for his past or present inappropriate behavior. Some of the above mentioned attitude is currently being reinforced

by David's uncle, an inmate at the Eddyville Penitentiary, who is filing legal motions to obtain David's release. During individual counseling sessions, David has expressed a great deal of confidence in his uncle's efforts. Also, during these sessions, it is quite apparent that David is afriad to divulge any information about himself or his family life that might indicate that there are some flaws in his personality and/or his family structure. Due to David's lack of motivation, all extra curricular activities and privileges are being withheld in an effort to encourage genuine participation in therapeutic activities. David has already begun to show some signs of unrest and interest in reacquiring the afore mentioned privileges. School personnel report that David is reading on approximately the fourth grade level and almost able to perform fifth grade math. They also report that his attitude in the classroom has been fair but that he is reluctant to work [1128] with others. Enclosed is a copy of David's most recent report card. Placement planning: At this time, a projected placement date cannot be given. If there are any questions, feel free to contact us. And, it's signed by Jim Mosley, Superintendent.
3416 Q It's also signed by Nelson . . .
A Nelson Hanson, yes.
3417 Q Now, the front of that report indicates that David birth date is May 19th, 1964, is that correct?
A Yes.
3418 Q So, at the time of this report, he was 16 years old in September of 1980?
A Yes.
3419 Q Miss Elam, I'd next like you to refer in your records to a letter.
MR. HECTUS: I'd like this marked as Exhibit D.
3420 Q A letter to Judge Snyder and signed by Nelson Henson and ask you if that's not a true and accurate copy of a report contained in your record?
A Yes.
3421 Q Now, what is the date on that letter?
A October the 10th, 1980.

3422 Q So, that would be some two weeks after the interium progress report that stated that David continued to be extremely resistive to all treatment methods?
[1129] A Yes.
3423 Q Will you read the letter to Judge Snyder to the Jury?

A (Witness reading letter:) Dear Judge Snyder, David Buchanan was admitted to the Northern Kentucky Treatment Center on July 10th, 1980 for the offense of robbery in the first degree. While David has been residing at the center, we have attempted to provide individual counseling which will enable him to function more positively in the community. Although we cannot predict future behavior, we certainly feel that David is better able to cope with personal problems. David will be returning to the community sometime within the next two weeks. He will, of course, remain under the supervision of the Department of Human Resources and his Community Service Worker will be Martha Elam, 400 Legal Building, Louisville, Kentucky. While on supervised placement, David will be expected to adhere to the following regulations and guidelines. 1: He will be expected to meet with his Community Service Worker, Martha Elam, on a regular basis. 2: He will be expected to follow any regulations which are established by his mother and Miss Elam. 3: He will be expected to obey all Federal, State and local laws. Thank you for your cooperation in this matter, if you have any questions, don't hesitate to contact us. And, that's signed by Nelson Hensley, Unit Director.

[1130] 3424 Q Now, Miss Elam, it was Judge Snyder, was it not that committed David in March or May of 1980, was it not?

A Yes.

3425 Q Now, do you know why that Department writes a letter to a Judge informing the Judge why a particular child is going to be released?

A No, I don't.

3436 Q Are you familiar that a Juvenile Judge can reject the release of a child?

A Yes.

3437 Q And, would not, a letter from the Dep.rtment of Human Resources reflecting that child's treatment by the Department enable a Judge to exercise his discretion on whether or not to object or not?

A Yes.

3438 Q Did you have any input into David's release from the Northern Kentucky Treatment Center?

A No, I did not.

3439 Q Reflecting on his psychologicals and his interium progress report, would it be your opinion that this letter was an accurate appraisal of David's progress?

A Based upon the reports I have in the record, no.

3440 Q All right. When was David released from Northern Kentucky after this letter was written?
[1131] A David was released October the 13th, 1980.
3441 Q Some three days after this letter was written?

A Yes.

3442 Q What happened then, where did he go?

A He was placed home with his mother.

3443 Q And, that placement was controlled, not by yourself, but by the Department, was it not?

A Yes.

3444 Q And, what responsibilities did you have once David was back home?

A To see that he got in school; to keep a regular contact with him and his family; to help him with any . . . if there's was any problems that existed.

3445 Q Where was David, in fact, enrolled in school?

A Initially, he went to Pleasure Ridge Park School.

3446 Q And, that was in the regular academic program, was it not?

A Yes.

3447 Q And, what happened subsequent to that with regard to David's education?

A And educational meeting was held and David was subsequently placed at Butler High School in an EMH class.

3448 Q And, what is the EMH?

A Educatable mentally handicapped.

3449 Q And, who initiated that particular meeting, [1132] the Department or the Board of Education?

A I contacted the Department to see that when he did return home that he was properly placed; and, they in turn, gave him a series of tests and replaced him in Butler.

3450 Q So, it's your testimony that the Department had him replaced rather than the Board of Education?

A Yes.

3451 Q Now, what happened next after David was placed at Butler?

A No reply.

3452 Q How long did he stay at Butler?

A Um . . . he stayed at Butler . . . he attended Butler sporadically. His attendance, as of December was, he had missed, I think approximately six days of school until the school called me on December 4th, and said that he was not attending school.

3453 Q And, what day did he enroll in Butler?

A November the 10th.

3454 Q And so, between November the 10th and December 4th, he missed six days of school?

A Yes.

3455 Q Out of approximately four weeks, three and a half weeks?

A Yes.

3456 Q All right. And, what was his progress after [1133] December the 4th?

A A I have no school reports. School was unable to find him, he was not going to school.

3457 Q He was not going to school?

A That's what the teacher told me.

3458 Q Okay. And, when did you find out that information?

A On December the 4th.

3459 Q What was David's school record between 12-4 and January the 16th?

A I don't have that record.

3460 Q Can I refer you to your records . . . do you have a report dated August the 11th, 1981, transfer hearing report and authored by yourself

A Where is that from?

3461 Q Transfer hearing report dated August 11th, 1981.

A No, I can't find it.

3462 Q All right.

A Oh, you mean my report?

3463 Q Yes?

A Yes, yes.

3464 Q Can I refer you to page 2, bottom paragraph which is labeled Section 3, School History?

A Yes.

3465 Q Now, would you read that and see if it refreshes your memory as to David's school attendance?

[1134] A The last sentence?

3466 Q Yes?

A At the beginning. Upon David's release from the Northern Kentucky Treatment Center on October 13th, 1980, he was placed with his mother, Colleen Brookins. David enrolled at Pleasure Ridge Park School in the 10th grade on October the 22nd, 1980. However, an educational meeting was held with Mrs. Brookins, David and Linda Wilheim at Butler High School on November 10th, 1980 and it was determined that David needed to be in EMH classes. David enrolled on November the 10th, 1980 at Butler High School, that same day. David also attended Mill Creek Vocational School where he was enrolled in commercial foods. David's attendance as of 12-4-80 was sporadic as he had a total of six absences.

From 12-4-80 until 1-16-81, David's school attendance was reportedly irregular.

3467 Q Now, you stated that it was the Department that made the decision to enroll David at Pleasure Ridge Park High School in the regular 10th grade program, right?

A Yes, it was mutual.

3468 Q Did it strike you as mutual that a child that had been reported to have an I.Q. of 74, extremely emotionally disturbed, fourth grade reading level and almost a fifth grade math level should be enrolled in the 10th grade?

A Well, yes.

[1135] 3469 Q Or, was that in accord with routine Department practice?

A I was not present at that meeting, so I don't know.

3470 Q I'm asking you if you have an opinion on the Department's practice?

A No.

3471 Q And, your notes I assume would stop on 1-16-81?

A Yes.

3472 Q That's the date that David was arrested?

A Yes.

3473 Q And, in fact, David's commitment to the Department had never been recinded, had it?

A No.

3474 Q Now, during the time that David was home the Department would refer to that placement as a 'home supervised placement', would it not?

A Yes.

3475 Q And, the Department, in its conditions of placement, sets certain rules and regulations and obligations that the child is supposed to meet, does it not?

A Yes.

3476 Q And, one of them would be regular school attendance?

A Yes.

[1136] 3477 Q And, should the Department elect to revoke that 'home supervised placement' and reinstitutionalize the child, there are procedures available, are there not?

A Yes.

3478 Q And, that would be administrative procedures?

A Yes.

3479 Q You would not have to go back to Court?

A That's right.

3480 Q Can you tell the Jury any administrative procedures were implemented in order to revoke David's 'home supervised placement'?

A No.

MR. HECTUS: Thank you, I have no further questions.

THE COURT: Mr. Jasmin, do you intend to ask any questions of this witness?

MR. JASMIN: Yes, Judge.

CROSS EXAMINATION:

QUESTIONS BY MR. JASMIN:

3481 Q Miss Elam, do you happen to know what that uncle's name is that you've been referring to in your records?

A No, I don't.

3482 Q When a kid is placed in the home aren't there certain responsibilities that the mother is supposed to have?

[1137] A Yes.

3483 Q Would one of those be to insure that he got up to go to school every morning?

A Yes.

3484 Q How many people do you have on your case load, ma'am?

A Approximately 25 to 30.

3485 Q Okay. Roughly, how many of those have a condition with reference to going to school?

A All of them that are at home.

3486 Q All right. There was no requirement that you, as a worker, go by and get him and get him ready in the morning or that type thing, was there?

A No.

3487 Q All right. Is there any . . . are there any of your reports which might characterize David Buchanan's sophiscation when it comes to, as we call it, having 'street sense'?

A Possibly a psychological from Danville.

3488 Q Could you possibly check that for me, ma'am, and see whether or not there's anything in those reports with which to refer to?

A Yes.

THE COURT: Do you understand what you're looking for?

THE WITNESS: I think I'm looking [1138] for . . . or you're talking about the psychological I read initially from Danville, right?

3489 Q Yes. What I'm asking you is, I know in those reports psychiatrist and psychologist always talk in terms of scores. I'm asking you, is there any report which could determine his degree of sophiscation as it comes to maneuvering, basically, in the community where he lives?

A No.

3490 Q Anything in there that talks about a term like, conning?

A There is a report from Danville called a progress evaluation report.

3491 Q Does that report say anything with reference to conning?

A Yes.

3492 Q What does it say with reference to conning, ma'am?

A You want me to read this?

3493 Q Yes, please?

A (Witness reading from report:) As a result of this evaluation, he was determined to be a fairly sophicated youth who would be capable of manipulative, conning type behaviors. He was placed into one of our more mature sophicated groups of counselling.

3494 Q Thank you very much, ma'am. Now, counsel has [1139] asked you about several reports and he's been specific with reference to the ones he wants read. Do you have any later psychological or psychiatric reports than those that he had you to read?

A Yes, I do.

MR. HECTUS: May I approach the bench a minute, I'm not sure what the Commonwealth Attorney is referring to?

THE COURT: Yes, sir.

(WHEREUPON, the following discussion was had at the bench out of the hearing of the Jury:)

MR. HECTUS: Judge, I believe if he's going to refer to either of the evaluations that were done to determine David's competency to stand trial, those evaluations were not done to diagnose emotional disturbances and that the Commonwealth is not entitled to rely on an item when all they would say is that he is competent to stand trial. The criteria by which the two determinations are made have nothing to do with one another and furthermore, when the reports that are at the demand of both this Court and another Court. Now, I don't know whether she has a copy of that psychological that was taken in Luther Luckett, but I would submit that emotional disturbance may not impair one's competency to stand trial.

MR. JASMIN: Your Honor, the Commonwealth's position is that defense counsel has gone on about having all of those items read into the record. [1140] He's been evaluated a lot more than Miss Elam has mentioned, with reference to effects and all of this

type thing. I think the psychiatric report which was made with reference to competency to stand trial, there are evaluations or judgments made which treat the same items which he has just brought in. If I am precluded from going into that, Judge, it puts the Commonwealth in the position where defense counsel can decide which items, having to do with psychiatric or psychological evaluations the Jury can be told about. If I see another report, I can't do anything with it and the Commonwealth feels that's grossly unfair.

MR. HECTUS: Judge, if I can respond to that. That's why I put in the entire reports each time. But, these subsequent reports, have of all, are not close in time to the events as these reports were and second of all, he was not being tested for emotional diagnosis.

THE COURT: Well, the things have to do with long diagnosis, with his itentity of time, self control and things like that that Mr. Jasmin wants have to do with long standing emotional stability as well as his knowledge and I'm unable to make a clear distinction between the two. It seems to me that you can't argue about his mental status at the time of the committment of this offense and exclude evidence when he was evaluated with reference to that mental status.

MR. HECTUS: As to that mental status, it was within his ability to assist his attorney.

THE COURT: It has quite a bit to do with it because what you've gone into has to do with his intelligence, [1141] his mental ability, all of his . . .

MR. HECTUS: Judge, can I ask you to review those reports before you make a ruling on that? I don't know what's contained in those reports.

THE COURT: I don't know . . . if you want to look at them go ahead, but I'm not about to try the law suit.

MR. HECTUS: Can you show me what reports you're referring to?

MR. JASMIN: August 21, 1981.

MR. HECTUS: Okay. Lets let it in.

THE COURT: Would you show counsel subsequent reports to which you've referred? Okay. Well, I think that that's sufficient in the nature of a response to Tom's request.

MR. HECTUS: Can I see it again?

MR. JASMIN: Hold on a minute.

THE COURT: I don't know about that last paragraph there.

MR. JASMIN: You mean that one?

THE COURT: That impression.

MR. JASMIN: Well, I'll take that out, of course, it has been read in all of the other reports, the impressions, but that doesn't bother me at all.

THE COURT: We'll stipulate the impressions part.

MR. JASMIN: Can we just bring her forward and explain this to her?

MR. HECTUS: Judge, I've other grounds for objections. One, is that this would have been completed at the time David was given these test, I believe that's prejudicial [1142] because it was done at the insistence of Court and counsel was not present and was not informed he could be present and David was not informed, at that time, that they could be used against him as he went trial and I would cite *Estell versus Commonwealth*, which indicates that the de-

fendant has a 5th amendment right to be told that it may later be used against him and I would object on that ground, also.

THE COURT: I overrule you on that.

MR. JEWELL: This report contains references to charges that relate to Stanford, that's our only concern, Judge.

THE COURT: Nothing at all.

MR. JASMIN: Judge, do you want to call her up?

THE COURT: No, I'll just tell her.

(WHEREUPON, that concludes the discussion at the bench out of the hearing of the Jury and Court continued as follows:)

THE COURT: Miss Elam?

THE WITNESS: Yes?

THE COURT: I've sustained the objection to the part which comes under the impression, you may read the rest of the report.

QUESTIONS CONTINUED BY MR. JASMIN:

3495 Q Miss Elam, what is the date . . . what is the date of the report that you are currently going to read from, ma'am?

[1143] A August 17th, 1981.

3496 Q And, that was a psychiatric report that you received, ma'am?

A Yes.

3497 Q Leaving out the portion that was indicated by the Judge, will you read what that report says, ma'am?

A (Witness reading report:) Mental Status Exam regarding David Buchanan: Mr. Buchanan is a 17 year old black male seen on 8-14-81 at the youth center for approximately a period of one hour at the request of Judge Fitzgerald. David's past records were reviewed at DHR Offices in the Legal Arts Building prior to this interview. At the initiation, David was slightly apprehensive about why I was there but the explanation offered

seemed to delay his anxiety and he was relaxed. Rapport was reasonably good and eye contact was adequate and David was appropriate inneractionally in the context of the setting. He was neither especially hostile or friendly, mainly tolerant and cooperative. The discussion focused on the hear and now since goal was to ascertain meeting of the 202A criteria or not. He was in good reality contact and reasonable knowledge of current events outside the center and seemed to be functioning in full normal I.Q. range. Short and long term memory appeared intact. There was not evidence of hallucinations or delusions. Affects was . . . affect was generally shallow without imporia [1144] or disporia. He seemed somewhat optimistic about the outcome of the charges pending against him. No suicidal obviation is present, although, David states at times he has been very angry at certain people, staff at the center and thought about hurting them. David was not especially anxious or restless except initially and seemed overall relaxed. And, it's signed by Robert Ryan, M.D.

3498 Q Does that complete, ma'am?

A Yes.

3499 Q Are there any other later psychological or psychiatric reports subsequent to that one of August 21st, ma'am?

A No.

3500 Q All right. Thank you very much, ma'am.

MR. JASMIN: I have no further questions.

MR. HECTUS: Judge, I have a couple of question on re-direct.

THE COURT: All right.

REDIRECT EXAMINATION:

QUESTIONS BY MR. HECTUS:

3501 Q Miss Elam, at the time of that report, David had been in custody at the detention center for some seven months, had he not?

A Yes.

[1145] 3502 Q And, what is a child's regimen at the detention center, if you know, what is the daily routine?

A I know he was in school and recreational activities.

3503 Q Do they have any sort of counseling while they're there?

A There was a social worker that saw him, I don't know how regularly.

3504 Q There was a social worker assigned to him?

A Yes.

3505 Q And, that social worker would be available at least every day, would he or she not be there everyday?

A I would think so, I don't know.

3506 Q Okay, thank you.

MR. HECTUS: I don't have any further questions.

THE COURT: All right, Miss Elam, you're now released as a witness and you're free to go. Next witness?

MR. HECTUS: Judge, defense rests.

EXHIBITS: PSYCHOLOGICAL REPORTS

DEFENDANT'S EXHIBIT A

Buchanan	David	
Last Name	First	Middle
05-19-64	Male	Black
Birthdate	Sex	Race

PSYCHOLOGICAL EVALUATION

Date of Examination: 06-03-80 CONFIDENTIAL

FOR PROFESSIONAL USE ONLY

EXAMINER(S): Carol Schultz

Tests Administered: WAIS, DAP, Bender, TAT, Rorschach

Reason for Referral:

David Buchanan is a 16-year old, black male referred for a psychological evaluation by Steve Yahnig, Director of the Lakefront Unit. The purpose of the evaluation was to aid in determining appropriate placement for David.

Background and Observations:

David was very quiet during the examination, and conveyed somewhat of a suspicious attitude; for example, he was slow to respond to questions and test stimuli; and frequently demanded that the examiner repeat questions or instructions a second time. When he did respond to test stimuli, he did not appear to take time to think about his answer. At times he repeated questions perseveratively. When performing the picture completion task David asked, "What's missing in this?" before each card. Throughout the session he appeared distant and his affect

was flat. He did not smile at any time, nor was there much variation in verbal expressions.

David's home is in Louisville, where he lived with his mother and two younger sisters. According to David, he has no difficulties at home. Although he was arrested on a charge of first degree burglary, he denies having been involved in the incident, or in previous incidents for which he was arrested. He resents being placed at the Danville Youth Development Center, as he says he did not commit the crime and does not need help. The Unit Director reports that the family supports the view of David's innocence and is generally hostile toward authority figures.

Test Results:

David obtained Full Scale, Verbal and Performance WAIS I.Q. scores of 74, 76 and 75 respectively. These scores fall in the Borderline range of intellectual functioning. Among the Verbal subtests David is markedly deficient in Verbal Comprehension. He is moderately to mildly deficient in the other Verbal areas. On the Performance subtests he displayed greater variability. He is markedly deficient in awareness of logical sequences and analysis and synthesis of nonmeaningful material, and moderately deficient in ability to distinguish essential from nonessential details. However, David displayed average ability in rapid visual-motor shifting and analysis and synthesis of meaningful material.

David's responses to projective tests suggest an individual who is isolated, mistrustful of others and interpersonally deficient. His reproductions of the Bender designs are indicative of emotional disturbance. Along with his test behavior and flat affect, his pattern of test responses suggest a mild thought disorder. He is likely to deal with his thought disturbance in a sociopathic manner. Although he tends to withdraw from others, when pushed, he becomes hostile.

Recommendations:

David's emotional disturbance and his resentment of his placement at the Danville Youth Development Center appear to militate against his success in this program. This view is reinforced by the negative attitude of the family toward David's placement here.

/s/ Carol Schultz
CAROL SCHULTZ
Examiner

/s/ Michael G. Notgal

CS:sbc
Typed: 06-11-80

NOT VALID UNLESS SIGNED

DEFENDANT'S EXHIBIT B

PSYCHOLOGICAL EVALUATION

David L. Buchanan NKTC# 2102
N/M—b. 5/19/64 DATE: August 21, 1980

David Buchanan was seen at the request of Jim Mosley, Superintendent, Northern Kentucky Treatment Center. Apparently David was recently transferred to Northern Kentucky from the Lakefront Program at Danville. He was not adjusting well to that program in terms of adapting to basic rules, regulations, and structure. In addition, his uncle, an inmate at Eddyville Penitentiary, has apparently filed several legal motions in his behalf. In any event, David is now at the Northern Kentucky Treatment Center and is being assessed relative to his current levels of emotional and/or personality functioning.

Since his social and legal history has been detailed elsewhere it will not be made an integral part of this report. However, it should be mentioned in passing that he comes from a fairly typical poor urban home in Jefferson County, and that he has been in court on multiple occasions for offenses ranging from theft over $100.00 to robbery.

A recent psychological evaluation found him to be an isolated, mistrustful, and depressed individual with a mild thought disorder. Sociopathic or psychopathic characteristics were also noted.

CURRENT OBSERVATIONS AND TEST RESULTS:

Since a recent psychological (June, 1980) was completed, a readministration of an intelligence test was not attempted at this time. Rather, this examiner focused on overall personality functioning. The House-Tree-Person, Bender-Gestalt, and a diagnostic clinical interview were presented and completed at this time.

David Buchanan presents as a quiet, rather withdrawn, and at least moderately depressed sixteen-year-old black youth. He is oriented for time, place, and person. His thinking, however, is extremely simplistic and very concrete. Impulse controls under even minimal stress are felt to be very poor. He is not seen as sophisticated, but rather as a very dependent, immature, probably pretty severely emotionally disturbed, and very easily confused youth. Short-term auditory and visual memory skills are impaired. David has extremely limited capacity for insight. Judgment is impaired. Interactions with peers is likely to be extremely superficial and very guarded. David uses the pyschological defenses of projection, denial, rationalization, and isolation extensively. He will be easily led by other more sophisticated delinquents or youths. He has very limited interpersonal skills and is likely to be seen by other youth as a pawn to be used.

David's human figure drawings are extremely bizarre. Combined with his flat affect and depressed mood, as well as other suggestions of a cognitive or thought disorder, it is felt that this individual has the potential for developing a full blown schizophrenic disorder. At the present time, he is at least extremely mistrustful, suspicious, and even paranoid. He is in need of ongoing extensive mental health intervention in addition to a highly structured but minimally stressful, from a psychological point of view, residential environment.

In view of the presence of extreme unmet dependency needs, early and sustained frustration, and minimal success in almost any endeavor there exists the strong probability that underlying considerable passivity and withdrawal is extensive anger and perhaps even rage. Thus, under the proper circumstances, David could be expected to be dangerous with respect to acts against persons. While this has not been a part of his history, it needs to be considered with respect to future treatment and eventual disposition.

DIAGNOSIS:

Undersocialized Aggressive Conduct Disorder DSM III.

Personality Disorder (paranoid personality) (The possibility exists for regression in psychological functioning to a full blown psychotic or schizophrenic state in the future.)

Sincerely,

/s/ Robert W. Noelker, Ph.D.
ROBERT W. NOELKER, Ph.D.
Licensed Clinical Psychologist

/ma

DEFENDANT'S EXHIBIT 1

DEPARTMENT FOR HUMAN RESOURCES
COMMONWEALTH OF KENTUCKY

August 28, 1980

To: Mr. Harold Vanderhoof
Assistant Director, Residential Services

FROM: Jim Mosley
Superintendent

SUBJECT: Psychological Evaluation for
David Buchanan
N/M—dob. 5-19-64
BSS# 4241010
Admitted: 7-10-80
Jefferson County

The above named youth was transferred to the Northern Kentucky Treatment Center as a temporary domicile from the Danville Youth Development Center. A psychological evaluation was needed to make a recommendation for the appropriate program. Based on the attached psychological evaluation which was done by Dr. Robert W. Noelker, Licensed Clinical Psychologist, it is my recommendation that this youth be admitted to the Northern Kentucky Treatment Center for treatment.

If you have further questions or if I can be of further assistance to you, don't hesitate to conatct me.

sh
cc: Mr. Jeff Loane, Director, Residential Services
Ms. Martha Elam, Community Service Worker
Team Leader
Folder
File

DEFENDANT'S EXHIBIT C

DEPARTMENT OF HUMAN RESOURCES
COMMONWEALTH OF KENTUCKY

September 26, 1980

To: Ms. Martha Elam
Community Service Worker

FROM: Louis E. Busch
Juvenile Counselor

SUBJECT: Buchanan, David L.
N/M—dob. 5-19-64
BSS# 4241010
NKTC# 2102
Admitted: 7-10-80
Jefferson County

INTERIM PROGRESS REPORT

PROGRAM:

There have been no major changes in David's overall treatment program.

PERSONAL AND INTERPERSONAL ADJUSTMENTS:

David continues to be extremely resistive to all treatment methods utilized thus far. All attempts to motivate David toward self-improvement have been unsuccessful. David continues to project a self-sufficient image. David has repeatedly denied having any difficulties that he would like to obtain a better understanding of/or ability to cope with. David flatly refuses any responsibility for his past or present inappropriate behavior.

Some of the above mentioned attitude is currently being reinforced by David's uncle, an inmate at the Eddyville Penitentiary, who is filing legal motions to obtain David's release. During individual counseling sessions, David has expressed a great deal of confidence in his uncle's efforts.

Also during these sessions it is quite apparent that David is afraid to divulge any information about himself or his family life that might indicate that there are some flaws in his personality and/or his family structure.

Due to David's lack of motivation all extracurricular activities and privileges are being withheld in an effort to encourage genuine participation in therapeutic activities. David has already begun to show some signs of unrest and interest in reacquiring the fore mentioned privileges.

School personnel report that David is reading on approximately the fourth grade level and almost able to perform fifth grade math. They also report that his attitude in the classroom has been fair, but that he is reluctant to work with others. Enclosed is a copy of David's most recent report card.

PLACEMENT PLANNING:

At this time a projected placement date can not be given.

If there are any questions concerning David's treatment program or progress, please feel free to contact us.

Thank you.

Approved:

/s/ Jim Mosley
JIM MOSLEY
Superintendent

/s/ Nelson Henson
NELSON HENSON
Unit Director

sh
cc: Mr. Jeff Loane, Director, Residential Services
Mr. Harold Vanderhoof, Assistant Director
Ms. Pam McFarland, Team Leader
Mr. Jim Mosley, Superintendent
Folder
File

DEFENDANT'S EXHIBIT D

DEPARTMENT FOR HUMAN RESOURCES
COMMONWEALTH OF KENTUCKY

October 10, 1980

The Honorable Daniel A. Schneider
Jefferson District Court—Division 12
Hall of Justice
600 W. Jefferson Street
Louisville, Kentucky 40202

RE: BUCHANAN, David
N/M—b. 5/19/64
NKTC# 2102
BSS# 4241010
Admitted: 7/10/80
Jefferson County

Dear Judge Schneider,

David Buchanan was admitted to the Northern Kentucky Treatment Center on July 10, 1980, for the offense of robbery in the first degree.

While David has been residing at the Center, we have attempted to provide individual counseling which would enable him to function more positively in the community. Although we cannot predict future behavior, we certainly feel that David is better able to cope with personal problems.

David will be returning to the community sometime within the next two weeks. He will, of course, remain under the supervision of the Department for Human Resources and his Community Service Worker will be Ms. Martha Elam, 400 Legal Arts Building, Louisville, 40202.

While on supervised placement David will be expected to adhere to the following regulations and guidelines:

1. He will be expected to meet with his Community Service Worker, Ms. Elam on a regular basis.

2. He will be expected to follow any regulations which are established by his mother and Ms. Elam.
3. He will be expected to obey all federal, state and local laws.

Thank you for your cooperation in this matter and if you have any questions, don't hesitate to contact us.

Sincerely,

/s/ Nelson Henson
NELSON HENSON
Unit Director

/ma

cc: Mr. Jeff Loane, Director, Residential Services
Mr. Harold Vanderhoof, Assistant Director
Mr. Jim Mosley, Superintendent
Ms. Martha Elam, Community Service Worker
Ms. Pam McFarland, Team Leader
Folder
File

COMMONWEALTH'S EXHIBIT 2

[SEAL]

UNIVERSITY OF LOUISVILLE
Louisville, Kentucky

Department of Family Medicine

August 17, 1981

Mental Status Exam
Re: David Buchanan

ID: Mr. Buchanan is a 17-year-old black male seen on 8/14/81 at the "Youth Center" for approximately a period of one hour, at the request of Judge Fitzgerald.

David's past records were reviewed at DHR offices in the Legal Arts Building prior to this interview.

At the initiation of the interview, David was slightly apprehensive about why I was there, but the explanation offered soon allayed his anxiety and he relaxed. Rapport was reasonably good, eye contact adequate and David was appropriate interactionally in the context of the setting. He was neither especially hostile or friendly, mainly tolerant and cooperative. The discussion focused on the here and now, since the goal was to ascertain meeting of 202a criteria, or not. He was in good reality contact, had reasonable knowledge of current events outside the Center, and seemed to be functioning in the dull normal IQ range. Short and long term memory appeared intact. There was no evidence of hallucinations or delusions. Affects was generally shallow, without emphoria or dysphoria. He seemed somewhat optimistic about the outcome of the changes pending against him. No suicidal ideation is present, though David states he has at times been very angry at certain people (staff) at the "Center" and thought about hurting them. David wasn't especially

anxious or restless except initially, and seemed overall relaxed.

Impression: It is my opinion that David is competent to stand trial and that he presently does not meet the criteria for KRS 202a involuntary commitment.

/s/ Robert J. G. Lange
ROBERT J. G. LANGE, M.D.
DHR/BHS/MH/CTS

JEFFERSON CIRCUIT COURT
NINTH DIVISION

INSTRUCTION NO. I—MURDER

You will find the defendant, David Buchanan, guilty under this instruction, if, and only if, you find Kevin Stanford guilty under Instruction No. I, and if you further believe from the evidence beyond a reasonable doubt all of the following:

(a) That at the time the defendant, Kevin Stanford, shot and killed Baerbel Poore as set forth in Instruction No. I of the other set of Jury Instructions pertaining to Kevin Stanford, the defendant, David Buchanan was present or nearby and was assisting or encouraging or holding himself in readiness to assist the defendant, Kevin Stanford, in so doing;

(b) That in so doing the defendant, David Buchanan, intended to cause Baerbel Poore's death;

AND

(c) That when he did so he was not acting under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse under the circumstances as he believed them to be.

If you find the defendant, David Buchanan, guilty under this instruction, you will fix his punishment at confinement in the penitentiary for not less than twenty (20) years or for life in your discretion.

JEFFERSON CIRCUIT COURT
NINTH DIVISION

VERDICTS FOR INSTRUCTION NO. I—MURDER

• • • •

VERDICT NO. 2

We, the Jury, find the defendant, David Buchanan, guilty of Murder under Instruction No. I and fix his punishment at confinement in the penitentiary for Life (To be served consecutively with any other sentences).

/s/ Charles B. Cornish
Foreman

JEFFERSON CIRCUIT COURT
NINTH DIVISION

No. 81 CR 1218
82 CR 0406

COMMONWEALTH OF KENTUCKY, PLAINTIFF

vs

DAVID BUCHANAN, DEFENDANT

September 17, 1982

FINAL JUDGMENT

The defendant at arraignment at arraignment having entered a plea of not guilty to the following charges included within the indictment; Count 1, Murder, Count 2, Robbery I, Count 3, Rape I and Count 4, Sodomy I and having on the 2nd day of August, 1982, appeared in open court with his attorney the case was tried before a jury which returned the following verdict on the 12th day of August, 1982: *VERDICT NO. 2*, WE, the JURY, FIND THE DEFENDANT, DAVID BUCHANAN, GUILTY OF MURDER UNDER INSTRUCTION NO. 1 AND FIX HIS PUNISHMENT AT CONFINEMENT IN THE PENITENTIARY FOR LIFE (TO BE SERVED CONSECUTIVELY WITH ANY OTHER SENTENCE). /S/ CHARLES B. CORNISH, FOREMAN. *VERDICT NO. 12*, WE, THE JURY, FIND THE DEFENDANT, DAVID BUCHANAN, GUILTY OF ROBBERY IN THE FIRST DEGREE UNDER INSTRUCTION NO. VI AND FIX HIS PUNISHMENT AT CONFINEMENT

IN THE PENITENTIARY FOR 20 YEARS (TO BE SERVED CONSECUTIVELY). /S/ CHARLES B. CORNISH, FOREMAN. *VERDICT NO. 14*, WE, THE JURY, FIND THE DEFENDANT, DAVID BUCHANAN, GUILTY OF RAPE THE FIST DEGREE UNDER INSTRUCTION NO. VII AND FIX HIS PUNISHMENT AT CONFINEMENT IN THE PENITENTIARY FOR 20 YEARS (TO BE SERVED CONSECUTIVELY). /S/ CHARLES B. CORNISH, FOREMAN. *VERDICT NO. 16*, WE, THE JURY, FIND THE DEFENDANT, DAVID BUCHANAN, GUILTY OF SODOMY IN THE FIRST DEGREE UNDER INSTRUCTION NO. VIII AND FIX HIS PUNISHMENT AT CONFINEMENT IN THE PENITENTIARY FOR 20 YEARS (TO BE SERVED CONSECUTVELY). /S/ CHARLES B. CORNISH, FOREMAN.

On the 14th day of September, 1982, the defendant appeared in open court with his attorney, Tom Hectus, and the court inquired of the defendant and his counsel whether they had a legal cause to show why judgment should not be pronounced, and afforded the defendant and his counsel the opportunity to make statements in the defendant's behalf and to present any information in mitigation of punishment, and the court having informed the defendant and his counsel of the factual contents and conclusions contained in the written report of the presentence investigation prepared by the Division of Probation and Parole, the Defendant agreed with the factual contents of said report with the exceptional of the statement made in regards to a kitchen knife being found in the juvenile center under a toilet seat. The statement made was that the defendant placed the kitchen knife there. The defendant denies that statement.

Having given due consideration to the written report of the Division of Probation and Parole, and to the nature and circumstances of the crime, and to the history, character and condition of the defendant, the court is of the opinion that imprisonment is necessary for the protection of the public because:

A. there is a substantial risk that the defendant will commit another crime during any period of probation or conditional discharge.

B. the defendant is in the need of correctional treatment that can be provided most effectively by the defendant's commitment to a correctional institution.

C. probation or conditional discharge would unduly depreciate the seriousness of the defendant's crime.

D. the defendant is not eligible for probation or conditional discharge because of the applicability of KRS 533.060.

No sufficient cause having been shown why judgment should not be pronounced, IT IS ORDERED AND ADJUDGED BY THE COURT that the defendant is guilty of Murder, Robbery I, Rape I and Sodomy I and is sentenced to Life on Murder, 20 Years on Robbery I, 20 Years on Rape I and 20 Years on Sodomy I. The sentences of 20 years on Robbery I, Rape I and Sodomy I are to run consecutive with each other for a total of 60 years but to run concurrent with the Life sentence for a total of Life in the Bureau of Corrections.

IT IS FURTHER ORDERED that the sheriff of Jefferson County deliver the defendant to the custody of the Department of Corrections at such location within this Commonwealth as the Department shall designate.

IT IS FURTHER ORDERED that the defendant is hereby credited with time spent in custody prior to sentence, namely 607 days as certified by the jailer of Jefferson County towards service of the maximum term of imprisonment.

After imposing sentence, the court informed the defendant that he has a right to appeal with the assistance of counsel; that if he is financially unable to afford an

appeal, a record will be prepared for him at public expense and counsel will be appointed to represent him; that an appeal must be taken within 10 days of the date of judgment, and that the clerk of the court will prepare and file a notice of appeal for him within that time if he so requests. Pending appeal, the defendant is remanded to custody.

/s/ Charles M. Leibson
CHARLES M. LEIBSON
Judge

ATTESTED: A TRUE COPY

PAULIE MILLER
Clerk

By /s/ Debbie Moore, D.C.

CC: ERNEST JASMIN
THOMAS HECTUS

SUPREME COURT OF KENTUCKY

DAVID BUCHANAN, APPELLANT

v.

COMMONWEALTH OF KENTUCKY, APPELLEE

June 13, 1985

OPINION

WINTERSHEIMER, Justice.

This appeal is from a judgment based on a jury verdict which convicted Buchanan of murder, robbery, rape and sodomy and sentenced him to life in prison.

The questions presented are whether the trial by a death-qualified jury where Buchanan did not face capital punishment violated due process by excluding a jury panel composed from a fair cross-section of the community, whether there was sufficient evidence to support the finding that Buchanan intended the victim's death, whether there is sufficient evidence to support a finding that he was not acting under extreme emotional disturbance at the time of the murder, whether the trial judge properly allowed the prosecution to introduce evidence of the competency evaluation, and whether the evidence of competency did violate his privilege against self-incrimination.

Barbel Poore was raped, sodomized and murdered in connection with the robbery of a gas station in Louisville on January 7, 1981. She, a 20-year-old service station attendant, was shot twice in the head. Kevin Stanford

was convicted as the trigger man. Buchanan accompanied Stanford and was also convicted of murder. Both Stanford and Buchanan were tried together. Stanford was sentenced to death, but Buchanan received a life sentence. This appeal followed.

This Court affirms the judgment of the circuit court.

In a joint trial for capital murder where the death penalty is sought against one defendant, but not the other, the impaneling of a death-qualified jury does not deprive the defendant of the right to a trial by a fair and impartial jury selected from a fair cross-section of the community.

Buchanan's pretrial motion to preclude death-qualification of the jury or to postpone such *voir dire* until the penalty phase of the trial was overruled. The jury was death-qualified individually by the trial judge prior to the guilt phase of the trial. We find no merit in the argument that such a process necessarily resulted in an extraordinarily conviction-prone jury or that it excluded a recognizable group from the jury panel so as to make the panel unrepresentative of a fair cross-section of the community.

We are not persuaded by the authority of *Grigsby v. Mabry*, 483 F.Supp. 1372 (E.D.Ark., 1980). Buchanan's arguments have been consistently rejected in other jurisdictions, *see Spinkellink v. Wainwright*, 578 F.2d 582 (5th Cir.1978); *United States ex rel. Clark v. Fike*, 538 F.2d 750 (7th Cir.1976); *Craig v. Wyse*, 373 F.Supp. 1008 (D.D.C.1974); *Martin v. Blackburn*, 521 F.Supp. 685 (E.D.La.1981 ; *State v. Hyman*, 276 S.C. 559, 281 S.E. 2d 209 (1981); *People v. Lewis*, 88 Ill. 2d 129, 58 Ill.Dec. 895, 430 N.E.2d 1346 (1981); *State v. Ortiz*, 88 N.M.2d 370, 540 P.2d 850 (1975); *Hovey v. Superior Court of Alameda County*, 28 Cal.3d 1, 168 Cal.Rptr. 128, 616 P.2d 1301 (1980).

People v. Kirkpatrick, 70 Ill.App.3d 166, 26 Ill.Dec. 356, 387 N.E.2d 1284 (1979) noted that no reviewing court has found any valid data indicating that a death-

qualified jury is conviction prone. A death-qualified panel tends to ensure those who serve on the jury to be willing and able to follow the evidence and law rather than their own preconceived attitudes. Such a process furthers the interests of both the defendant and prosecution in presenting the case to an impartial jury. *See Gall v. Commonwealth*, Ky., 607 S.W.2d 97 (1980); *Meyer v. Commonwealth*, Ky., 472 S.W.2d 479 (1971).

Buchanan's contention that death qualification excludes a cognizable group from the jury panel so as to make it unrepresentative of a fair cross-section of the community is also unconvincing. Persons who are unalterably opposed to capital punishment do not constitute a cognizable group for the purpose of the fair cross-section requirement. Such persons have diverse attitudes which defy classifications and have not been singled out by the public for special treatment. They do not meet the criteria for making a cognizable class. *United States v. Kleifgen*, 557 F.2d 1293 (9th Cir. 1977); *Brown v. Harris*, 666 F.2d 782 (2nd Cir.1981). Opponents of capital punishment are not a distinct opinion-shaped group. *See State v. Taylor*, 304 N.C. 249, 283 S.E.2d 761 (1981). It was not reversible error to death-qualify the jury.

There is sufficient evidence in the record to support the jury finding that Buchanan intended the death of the victim.

There was testimony from Troy Johnson that Buchanan believed the robbery of the station would be easy because the victim was alone, but nonetheless supplied the bullets for the previously unloaded gun. Johnson also testified that Buchanan borrowed his brother's gun and bullets for use in the robbery, and that he did not believe Buchanan's assurances that the victim would not be harmed. Johnson had agreed to participate in the robbery until Buchanan acquired ammunition for the weapon and then Johnson refused to leave the car.

Buchanan planned the robbery; he acquired the murder weapon and the ammunition. He enlisted the assistance

of Stanford and instructed Johnson throughout the affair to remain in his car and to follow the victim's car. Buchanan had the same motive as Stanford for permanently silencing the victim. He knew that the victim could identify Stanford which meant that he would also ultimately be found. Considering the evidence as a whole, a reasonable jury could conclude that Buchanan intended the victim's death. *Trowel v. Commonwealth*, Ky., 550 S.W.2d 530 (1977).

There is sufficient evidence to support the finding by the jury that Buchanan was not acting under extreme emotional disturbance at the time of murder. There is nothing in the record to support the argument that the murder was precipitated by extreme emotional disturbance. The entire sequence of events indicated a cold and calculating premeditated act by Buchanan. He sought the assistance of Stanford and Johnson, obtained a gun and bullets, and timed the robbery so that the victim would be closing the station and probably alone. Certainly this was not an unplanned event. *See Brown v. Commonwealth*, Ky., 555 S.W.2d 252 (1977); *Gall v. Commonwealth, supra.*

The introduction by Buchanan of three Department of Human Resources reports is not evidence of extreme emotional disturbance. *See Wellman v. Commonwealth*, Ky., (Rendered June 13, 1985). Evidence of a mental defect alone does not support a defense of extreme emotional disturbance. *Wellman, supra.* There was sufficient evidence for a jury to find otherwise. There was a letter from DHR to Judge Snydor which noted Buchanan had benefited from treatment. The prosecution also introduced a Danville DHR report indicating that Buchanan was sophisticated, manipulative and cunning. There was also evidence of Buchanan's August 17, 1981 competency report which indicated that he was functioning normally.

The trial judge properly allowed the prosecution to introduce evidence of Buchanan's competency evaluation.

Buchanan introduced evidence of three DHR reports relating to his mental condition which had been prepared for use by juvenile authorities several months before the crimes herein. The report which Buchanan contests was cumulative to the DHR letter and report which already had been introduced into evidence. Buchanan opened the door for the introduction of the competency report by introducing only those DHR reports which were beneficial to him. The fact that the report was made for the purpose of determining his competency to stand trial did not render the objective observations contained therein inadmissible. There is nothing to indicate that Dr. Ryan, the author of the competency report, was any less qualified than the psychologist who prepared the other DHR reports. The evidence of the competency report was nonprejudicial and harmless beyond a reasonable doubt in view of the considerable evidence that the murder was well planned and premeditated. The evidence of the competency report did not affect the ultimate outcome of the trial. *Stiles v. Commonwealth*, Ky.App., 570 S.W.2d 645 (1978).

The evidence of Buchanan's competency report did not violate his privilege against self-incrimination. *Estelle v. Smith*, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981), is distinguishable from this case. In *Smith, supra*, the defendant was incriminated by his remarks to the examiner. In this case, the report contained no inculpatory statements by Buchanan or any accusatory observation by the examiner who merely recited his observations of Buchanan's outward appearance.

When Dr. Ryan examined Buchanan, he had waived his right to silence by giving the police a confession. *Parrish v. Commonwealth*, Ky., 581 S.W.2d 560 (1979). Any error in admitting the competency report was nonprejudicial and harmless beyond a reasonable doubt in view of the confession and the overwhelming evidence of guilt. *Stiles, supra.*

The judgment is affirmed.

All concur, except for LEIBSON, J., who did not sit.

SUPREME COURT OF THE UNITED STATES

No. 85-5348

DAVID BUCHANAN, PETITIONER

v.

KENTUCKY

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KENTUCKY

ON CONSIDERATION of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

May 27, 1986

No. 85-5348

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

DAVID BUCHANAN, *Petitioner,*

v.

COMMONWEALTH OF KENTUCKY, Respondent.

On Writ Of Certiorari To The Supreme Court Of Kentucky

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

I.

DID THE FEDERAL CONSTITUTION PERMIT THE STATE TO ELIMINATE, BY PEREMPTORY AND CAUSE CHALLENGE, 20% OF THE QUALIFIED VENIRE BASED ON RELIGIOUS OR POLITICAL VIEWS ON CAPITAL PUNISHMENT WHEN THE STATE DID NOT SEEK THE DEATH PENALTY AGAINST PETITIONER AT A JOINT CAPITAL/NON-CAPITAL TRIAL?

II.

CAN A JUVENILE COURT-ORDERED PSYCHIATRIC EXAMINATION, DIRECTED AT COMPETENCY TO STAND TRIAL WITHOUT WAIVER OF THE CHILD'S 5TH AND 6TH AMENDMENT RIGHTS, BE USED TO REBUT A MITIGATING MENTAL STATE DEFENSE BY READING THE REPORT TO THE JURY DURING A MURDER TRIAL?

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OPINION AND JUDGMENT BELOW

Judgment was entered by the Jefferson County, Kentucky, Circuit Court on September 17, 1982 [Joint Appendix, hereinafter A 76-79]. The opinion of the Kentucky Supreme Court was rendered on June 13, 1985 and is reported. *Buchanan* v. *Kentucky*, 691 S.W.2d 210 (Ky. 1985) [A 80-84].

JURISDICTION

The opinion of the Kentucky Supreme Court was entered on June 13, 1985. No rehearing was sought. The petition for writ of certiorari was filed on August 12, 1985 and was granted May 27, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution, in pertinent part:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech . . .

The Fifth Amendment to the United States Constitution, in pertinent part:

> No person . . . shall be compelled in any criminal case to be a witness against himself . . .

The Sixth Amendment to the United States Constitution, in pertinent part:

> In all criminal prosecutions the accused shall enjoy the right to a . . . trial, by an impartial jury . . . to be confronted with the witnesses against him . . . and to have the assistance of counsel for his defence.

The Fourteenth Amendment to the United States Constitution, Section One, in pertinent part:

> . . . nor shall any State deprive any person of . . . liberty . . . without due process of law; nor deny to any person . . . the equal protection of the laws.

KY. REV. STAT. 29A.300, entitled "Oath to petit jury":

> The court shall swear the petit jurors using substantially the following oath: "Do you swear or affirm that you will impartially try the case between the parties and give a true verdict according to the evidence and the law, unless dismissed by the court?"

Kentucky Rule of Criminal Procedure, RCr 9.16, entitled "Separate trials," in pertinent part:

> If it appears that a defendant or the Commonwealth is or will be prejudiced by a joinder . . . of defendants . . . for trial, the court shall . . . grant separate trials of defendants or provide whatever other relief justice requires . . .

STATEMENT OF THE CASE

a. Pre-Crime Psychological Reports

In the summer of 1980, David Buchanan just turned 16. He was a ward of the Commonwealth, having been sent to Danville Youth Development Center by the Jefferson County, Kentucky, Juvenile Court [Joint Appendix, A 38]. David was a black youth who "comes from a fairly typical poor urban home" [A 44, 64]. He had been in juvenile court for various offenses "ranging from theft over $100 to robbery" [A 44, 64]. Two psychologists filed a report recommending transfer to another juvenile facility due to "David's emotional disturbance and his resentment of his placement . . ."

> *Test Results:*
>
> David obtained Full Scale, Verbal and Performance WAIS I.Q. scores of 74, 76 and 75 respectively. These scores fall in the *Borderline range of intellectual functioning.*[1] Among the Verbal subtests David is markedly deficient in Verbal Comprehension . . .
>
> * * *
>
> David's responses to projective tests suggest an individual who is isolated, mistrustful of others and interpersonally deficient. His reproductions of the Bender designs are indicative of *emotional disturbance.* Along with his test behavior and flat affect, his pattern of test responses suggest a *mild thought disorder.* [A 62].

[1] All emphasis supplied by petitioner unless otherwise indicated.

So in August 1980 David was transferred to Northern Kentucky Treatment Center. A licensed clinical psychologist employed by the Commonwealth gave David various tests and a "diagnostic clinical interview." His report states:

> David Buchanan presents as a quiet, rather withdrawn, and at least moderately depressed sixteen-year-old black youth. He is oriented for time, place, and person. *His thinking*, however, *is extremely simplistic* and very concrete. *Impulse controls under even minimal stress are felt to be very poor.* He is not seen as sophisticated, but rather as a *very dependent, immature, probably pretty severely emotionally disturbed,* and *very easily confused youth.* Short-term auditory and visual memory skills are impaired. David has extremely limited capacity for insight. *Judgment is impaired.* Interaction with peers is likely to be extremely superficial and very guarded. David uses the psychological defenses of projection, denial, rationalization, and isolation extensively. He will be *easily led by other more sophisticated delinquents* or youths. He has very limited interpersonal skills and is *likely to be seen by other youth as a pawn* to be used.
>
> David's human figure drawings are extremely bizarre. Combined with his flat affect and depressed mood, as well as other suggestions of a cognitive or thought disorder, it is felt that this individual has the potential for developing a *full blown schizophrenic disorder.* At the present time, he is at least extremely mistrustful, suspicious, and even paranoid. He is in need of *ongoing extensive mental health intervention* in addition to a highly structured but minimally stressful, from a psychological point of view, residential environment.
>
> In view of the presence of extreme unmet dependency needs, early and sustained frustration, and minimal success in almost any endeavor there exists the strong probability that underlying considerable passivity and withdrawal is extensive anger and perhaps even rage. Thus, under the proper circumstance, David could be expected to be dangerous with respect to acts against persons. While this has not been a part of his history, it needs to be considered with respect to future treatment and eventual disposition.
>
> *DIAGNOSIS:*
>
> Undersocialized Aggressive Conduct Disorder DSM III.

Personality Disorder (paranoid personality) (The possibility exists for regression in psychological functioning to a *full blown psychotic or schizophrenic state in the future*) [A 65, 66].

Based on Dr. Noelker's evaluation, David was "admitted . . . to . . . Northern . . . for treatment" on August 28, 1980 [A 67]. One month later, the "unit director" at Northern reported to Martha Elam, David's social worker, that David was "extremely resistive to all treatment methods utilized thus far . . ." [A 68]. David was reading "on . . . the fourth grade level and almost able to perform fifth grade math" [A 69].

Two weeks later, October 10, the "unit director" wrote to the juvenile court judge informing him they were releasing David. "Although we can not predict future behavior, we certainly feel that David is better able to cope with personal problems . . . He will, of course, remain under supervision of" the Commonwealth's Department for Human Resources and his social worker, Ms. Elam[2] [A 70].

David returned to live with his mother on October 13, 1980. He was initially assigned to "the regular academic program" in the 10th grade. Apparently when his teacher complained, "it was determined that David needed to be in EMH [Educatable mentally handicapped] classes . . . David's attendance was sporadic . . . irregular" [A 51-52]. Although "regular school attendance" was required and the Commonwealth could have "reinstitutionalized the child", no action was taken [A 52-53] although his teacher reported to his social worker that the "[s]chool was unable to find him, he was not going to school" [A 50].

b. The Killing of Baerbel Poore

January 7, 1981, was a cold, snowy winter day. David Buchanan and his young friend Troy Johnson "started talking about [not having] . . . any money." David went out to shovel

[2] Ms. Elam was to later testify at trial that "this letter was [not] an accurate appraisal of David's progress." Under Kentucky procedure the juvenile judge could have rejected David's release [A 49].

snow but came back with only "change." "[T]hat's when he started talking about Checker Oil Station . . . robbing it." David "said nobody would get hurt." When David promised "nobody would get hurt or nothing", Troy got a gun and "bullets from where my brother keep them" without his brother's knowledge [Transcript of Evidence, TE 1030-31].

Troy refused to actually go to the station itself but agreed to drive. David talked to another juvenile, Kevin Stanford, about the robbery.[3] They drove Troy's car and picked up Kevin who lived near the gas station [TE 1033]. David and Kevin left Troy at the car. Stanford had the gun. They saw the white female attendant, Baerbel Poore, getting ready to close up and approached her. Stanford took Baerbel back to the restroom while David tried to get the safe open. He couldn't and so he went and found Stanford "having intercourse with the service station attendant . . . and they took turns raping and sodomizing" her [TE 484-85].

Since they didn't have any fuel, David took $2.00 worth in a gas can [TE 485]. While he was gone, unbeknownst to David, Kevin stole $143.07 from the cash register [TE 1319]. Stanford then took Ms. Poore in her car and "told [David] to get into the car with Troy and follow" Baerbel's car [TE 485]. David told Troy they were following Ms. Poore's car because they were going "to have some more sex with her." Troy pulled up behind Baerbel's car a few blocks away. David got out. As he approached, Stanford leaned in the window of Baerbel's car and shot her. David turned and ran back to the car as Kevin fired another shot at the victim, killing her [TE 1037-38].

Stanford returned to Johnson's car, got in and gave Troy the gun back. Kevin got out near the Checker station [TE 1041]. Troy and David went home and put the gun back [TE 486]. Stanford stole 300 cartons of cigarettes from the empty gas station, later selling them on his own [TE 946].

[3] David Buchanan's confession differed slightly from Troy's testimony. David told Det. Hall that Stanford telephoned David and asked David to meet him (Kevin) "and to bring a gun with him that he had a place that needed to be taken down" [TE 484].

c. Pre-Trial Motions

After their arrest, Stanford and Buchanan, but not Johnson,[4] were transferred from juvenile to adult court.[5] Prior to waiver, the juvenile court, apparently on his own motion, "requested" a "mental status exam" of David by a psychiatrist.[6] Dr. Robert Lange saw David for "one hour" on August 14, 1981 after reviewing his social worker's records. "The discussion focused on the here and now, since the goal was to ascertain meeting of the 202A criteria[7] or not." Dr. Lange reported his "impression" to Judge Fitzgerald in a brief letter: "It is my opinion that David is competent to stand trial and that he presently does not meet the criteria for KRS 202A involuntary commitment" [A 72-73].

Buchanan argued pre-trial that any death sentence would be disproportionate considering his age, emotional disturbance and relative culpability[8] [R 330-333]. He also sought to prevent a capital prosecution since the Kentucky legislature had abolished the death penalty for juveniles although the statute

---

[4] Johnson pled guilty to accomplice liability in juvenile court [TE 1029] in return for testimony [Transcript of Record, No. 1218, R 359].

[5] The judge did find Buchanan "amenable to treatment" [R 357].

[6] In circuit court Buchanan's counsel objected to evaluation of his client by a "state expert as to his competency" since any unfavorable report might be used "against my client" [TH 12/18/81, 6]. He asked for "an expert to help to develop . . . a defense relating to . . . emotional disturbance which is a different issue obviously than competency . . . and until I decide to use [it] . . . that report would remain privileged . . . which is the difference . . . [from a] competency to stand trial" report [TH 12/18/81, 7].

[7] KY. REV. STAT. Chap. 202A is entitled "Hospitalization of the Mentally Ill".

[8] In *Smith* v. *Commonwealth*, 634 S.W.2d 411, 413 (Ky. 1982), the Court held that a trial judge can preclude the death penalty prior to trial. The Court reasoned that "the ultimate decision of penalty is within the province of the trial judge" under Kentucky law. "It, therefore, becomes self-evident that the court should not be required to entertain an exercise in futility . . . when it will ultimately decide, for as significant a reason" that any death sentence would be "disproportionate." In *Smith*, the same trial judge as here had barred the death penalty for a non-triggerman since the actual killer had received a bargained non-death plea.

hadn't yet taken effect[9] [R 423-425]. Third, petitioner moved to dismiss the capital portion of the indictment based on uncontradicted evidence that: 1) he was not the "trigger-man", Stanford was; 2) Troy Johnson supplied the gun; and 3) David had no intent to kill and didn't know Stanford was going to shoot Ms. Poore. Troy testified:

> Q: So both you and David thought that the gun wasn't going to be used, isn't that true?
>
> A: Yes, sir.
>
> * * * *
>
> Q: So David never spoke about anything else?
>
> A: No sir.
>
> Q: Especially shooting anybody?
>
> A: Yes sir [A 21-22].

An off-the-record hearing was held when the judge expressed concern whether the "only evidence is that Buchanan [was a] non-triggerman." At the hearing, the prosecutor "ha[d] no objection" to dismissal of the "capital portion of the indictment . . . [it was] conceded by Com[monwealth] Atty. [sic] death penalty would be unconst. [sic] for Buchanan, Enmund v. Fla. [sic]."[10] The judge signed the order barring the death penalty for petitioner [A 24].

d. "Death-Qualification"

Buchanan moved to preclude "death-qualification of [the] jury" until after the "guilt/innocence phase . . . '[D]eath-qualification' voir dire violates the defendant's right to an impartial jury drawn from a fair cross-section of the community under the Sixth and Fourteenth Amendment . . ." He also relied on "equal protection of the law", complaining that juror views on the death penalty are "arbitrarily single[d] out . . ." Petitioner

---

[9] KY. REV. STAT. 208F.040(1), and the rest of a new juvenile code was enacted but repeatedly postponed by the legislature due solely to lack of funding [Transcript of Hearing, TH 3/8/82, 7].

[10] Judge's handwritten notes on order [TR 170].

complained of restriction of "voir dire by the defense on the issues of punishment" while allowing "use by the state of 'death-qualification' voir dire" denies "due process of law" because it affords "the state an advantage in jury selection" [A 5-6].

Buchanan also moved for "separate juries for guilt/innocence and sentencing phases" with no disqualification for capital punishment views by the guilt/innocence jury. Referring to "scientific studies" and filing one,[11] petitioner complained that "jurors who are in favor of capital punishment are 'authoritarian types' and are more likely both to convict and to give greater sentences . . ." The state interest in a single jury was said to be minimal or non-existent [A 3-10].[12] The prosecutor opposed the motions as "contrary to current law" [A 11].

The trial judge told Buchanan's lawyer his suggested remedies "show[ed] a lot of creativity" [A 14]. The court mentioned another remedy—voir dire on the death penalty after the guilt phase with, presumably, substitute jurors replacing anyone who couldn't follow the sentencing law [A 16-17]. However, the motions were denied, although they "involve some unique, new creative . . . principles of law . . . [I]f you want to strike new ground . . . address . . . the appellate court" [A 18]. The motions were renewed and denied as "death-qualification" began [A 26-27].

Judge Liebson ruled that he alone would question the jurors on the subject of the death penalty.[13] For the most part, this

[11] Zeisel, *Some Data on Juror Attitudes Towards Capital Punishment* (University of Chicago Monograph 1968) [Zeisel].

[12] Buchanan pointed out that, in addition to capital prosecutions under KY. REV. STAT. 532.025, Kentucky also provides for a bifurcated procedure in persistent felon cases. KY. REV. STAT. 532.080(1) specifically permits a new jury for phase II of a persistent felon trial "for good cause." Having shown "good cause", petitioner argued for the same procedure to be applied to his case.

[13] In Kentucky, the court "may permit" counsel to voir dire or "may itself conduct the examination" if it permits counsel to "supplement the examination" by tendering "such additional questions" as the court "deems proper." RCr 9.38.

consisted of a single question:

> Do you have any personal conviction against imposing the death penalty, such that you could not consider it under the circumstance *in this or in any other case* and regardless of what the evidence may be? [A 27].[14]

Counsel for Stanford[15] tendered proposed death penalty questions focusing on four essential points. First, whether the veniremember could consider authorized punishments other than death. For example:

> 1. Do you believe that all persons convicted of the crime of murder should receive the death penalty?
>
> 2. Would you automatically vote in favor of the death penalty . . . even if you had the discretion to give a lesser punishment?
>
> * * * *
>
> 4. Would you automatically vote for the death penalty regardless of any mitigating evidence offered by the defendant as to why he should not get the death penalty?
>
> * * * *
>
> 17. . . . [Could you] consider, according to the law . . . all possible penalties, including the term of years in prison between 20 and life, a life sentence and the death penalty?[16]
> [Transcript or Record, No. 406, TR 210].

[14] Often the words "conscientious scruples" were substituted for "personal convictions" [TE 65, 69, 71, 73, 76-77, 80, 82, 85, 89, 91, 96, 99, 107, 110, 113, 115, 118, 124, 126, 131, 133-34, etc.]. Sometimes the court referred to "religious convictions or philosophical or ethical convictions" [TE 226].

[15] The court ruled that "whenever any defendant makes an objection . . . the other defendant . . . automatically . . . [has] the same objection . . ." The prosecutor agreed: "I think that would be proper because . . . Buchanan is not involved in . . . death-qualification" [A 28]. The judge stated this also: "You're not even involved" [A 28].

[16] KY. REV. STATS. 507.020 (murder) and 532.025 (penalty phase) permit the jury a range of punishment in capital cases of 20 years to death.

Second, the proposed questions distinguished, unlike the court's single inquiry, between the case at hand and any other case:[17]

> 24a. Is it your irrevocable position that you would vote automatically against the imposition of capital punishment no matter what case you had before you?
>
> 24B. Could you think of any case in which you may consider the death penalty? [TR 214].

Third, counsel suggested finding out if the potential jurors could follow the law, notwithstanding personal views:

> 24c. Even though you believe capital punishment should never be inflicted could you nonetheless subordinate this personal view to your duty to abide by your oath as a juror and to obey the law of this state which says that you should consider such punishment in connection with other possible punishments of life imprisonment and imprisonment for a period of 20 years to life? [TR 214].

Fourth, a request was made to minimize any misunderstanding as to why the judge was asking question(s) which seemed to emphasize the death penalty:

> 25. Do you realize what you say here and your oath as a juror does not bind you to vote for the death penalty, nor does it bind you to vote for any punishment, but to consider all punishments you are instructed on?
>
> 26. Even though you have been asked several questions concerning the death penalty do you realize that you may not even have to reach that decision? [TR 214].

All of these questions were rejected, the court permitting "one question and one question only . . . we are not going to be involved in any . . . brainwashing procedure . . ." [A 12].

> THE COURT: I don't think rehabilitation cures anything in my mind. If a guy says that he is unalterably opposed to giving the death penalty and you then got him to say that he would put aside his own personal opinion and follow the law, I would not know what to believe about the state of that man's mind [A 14].

---

[17] Another question sought to ascertain whether death penalty views would "affect your ability to return a fair verdict on guilt or innocence"—identifying so-called "nullifiers" [TR 214].

* * *

> I intend to be very liberal about . . . excusing people for cause . . . if somebody . . . has . . . some sort of bias . . . I don't intend to . . . ask if you can put your personal opinion out of the way . . . [A 15].

Seven jurors were excused for cause, over objection, due to views regarding capital punishment.[18] Four others who indicated some hesitancy about capital punishment[19] were struck peremptorily by the prosecutor [TR 219]. Thus the "death-qualification" process permitted the prosecutor to identify and excuse 11 of 53 otherwise qualified veniremembers—approximately 20% of the panel.[20]

---

[18] 1. *Aspatore:* "I would hate to . . . I don't think I could . . . I haven't never been on a jury before . . . I haven't been exposed to this . . . I just don't think I could give anybody the death penalty" [A 29-30].

2. *Cain:* "Would you repeat that . . .? I don't know . . . I don't know if I could decide that or not . . . it would be hard . . . Is that what this case is about . . .? I don't think I could decide that" [A 30-31].

3. *Ehman:* "I don't know . . . I just couldn't see making that kind of decision. It's kind of hard for me to do . . ." [A 32].

4. *Englert:* "I think I would have a hard time . . . I wouldn't vote for the death penalty, I know that . . ." [A 33].

5. *Roundtree:* Because of "my religious convictions . . ." [A 34].

6. *Sebrey:* "I . . . don't believe I should take a life" [A 35].

7. *Frye:* "I just don't think I could do that . . . I was taught . . . in the church . . ." [A 36].

[19] 1. *Cockerel:* "If the evidence proved they were guilty and it was necessary, I think I could" [TE 89].

2. *Kargl:* "As a mother, no, I don't think I could personally take on that responsibility" [TE 136].

3. *Roden:* "I really don't know about that" [TE 175].

4. *Williams:* "I don't know" [TE 204].

[20] Judge Liebson qualified 46 potential jurors [TE 269]. Since 7 were excused for death penalty views, 53 of the venire were qualified *as to petitioner.* The panel of 46 was reduced to the ultimate 12 by random draw [TE 269-71; 1342] and peremptory strikes. Over defense objection [TE 3/1/82, 21-27], the prosecutor was permitted 6 strikes and each defendant 5 for a combined total of 10 [TR 218-20]. Other veniremembers were excused, of course, for reasons not in issue here.

For example, 21 of the 59 veniremembers were excused on the first day of trial (the jurors last day of service) because they didn't want to or couldn't serve an additional two weeks. The trial judge earlier had considered Buchanan's objection and conceded such a procedure might implicate Buchanan's right "to a jury of draftees, not a jury of professional volunteers . . ." but started jury selection that day anyway [TH 3/1/82, 54-55].

e. Trial, Verdict And Appeal

Buchanan's defense (actually the prosecution's evidence) established that Stanford was the main actor and emphasized the lack of proof that David agreed, knew or should have known[21] Stanford was going to execute the victim.[22] He called, as his only defense witness, David's social worker. Ms. Elam read to the jury the pre-crime psychological reports. In response, the prosecutor asked about "later psychological or psychiatric reports." Defense counsel objected to the use of a "competency . . . evaluation [to rebut an] emotional disturbance [defense] . . . when the reports . . . are at the demand of . . . this Court and another Court. . ." [A 55]. Additionally, petitioner complained that "counsel was not present and was not informed he could be present and David was not informed, at that time, that they could be used against him . . . I would cite *Estelle* . . ." [A 57]. Ms. Elam read Dr. Lange's report[23] [A 58-59].

> He was in good reality contact and reasonable knowledge of current events outside the center and seemed to be functioning in full normal I.Q. range . . . David states at times he has been very angry at certain people, staff at the center and thought about hurting them [A 59].

In closing, defense counsel conceded David's guilt of robbery but not of sexual assault. He argued: "David Buchanan had no

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[21] The primary question in petitioner's case was whether the jury believed he had the "intent to cause the death of" Baerbel Poore or "wantonly engage[d] in conduct which create[d] a grave risk of death to" her. KY. REV. STAT. 507.020(1)(a) and (b).

[22] If this was the purpose of the car trip it was certainly illogical and only created an opportunity for witnesses to view the slaying, as they did [TE 953-992]. The prosecutor agreed that petitioner was not guilty of kidnapping Ms. Poore from the gas station and refused to proceed on the grand jury indictment for this offense [A 4; TH 3/9/82, 4].

[23] The reason that the prosecutor had to reach back to the juvenile court competency report was that the two circuit court competency reports were sealed in the record as "privileged at least as to . . . the Commonwealth, because . . . the Court is ordering . . . its own evaluation . . . [of] the defendant's ability to stand trial . . ." [TH 12/18/81, 11; R 396, TR 377]. Judge Liebson stated in his order: "It appears to the Court from personal observation that there may be a need for treatment . . . [K]eep as long as he needs treatment" [TR 126].

idea whatsoever what was in Kevin Sanford's mind" [TE 1289]. If guilty of any degree of homicide, he was under "extreme emotional disturbance" which mitigated the offense[24] and the punishment [TE 1305].

The prosecutor's first line of attack in closing was the competency exam: "[D]o you remember when he put Ms. Elam on, he didn't mention anything . . . [about] that last psychological or psychiatric evaluation . . ." [TE 1309]. However, his basic position vis a' vis petitioner was that there was a "conspiracy" because David "starts the ball rolling" [TE 1319]. Contrasting the two defendants, the Commonwealth argued that Stanford's guilt of murder "did not stem from just his participation in the robbery" as Buchanan's did.

> I am not asking you to find [Buchanan] guilty [of intentional murder] . . . [T]o be perfectly honest with you . . . [Buchanan's] involvement comes up because he was involved in the conspiracy to commit the robbery . . . [TE 1336].

The prosecutor argued for a "wanton" murder conviction. However, he didn't get it. The jury gave the Commonwealth a verdict of *intentional* murder despite the prosecutor's candid admission that the evidence did not support such a verdict. The jury recommended a life sentence and took the unusual step of insisting that it be "served consecutively with any other sentence."[25] David was also convicted and given the maximum

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[24] Absence of "the influence of extreme emotional disturbance" was an element of intentional murder under KY. REV. STAT. 507.020(1)(a). See note 64. But the "reasonableness" of the emotional disturbance "is to be determined from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believed them to be . . ." Thus, this all white, death-qualified jury of 12 was required by law to try to understand the situation from David Buchanan's perspective. The ability of this jury to do so was critical to justice. The prosecutor, on the other hand, argued about what "any reasonable person" would have done [TE 1312].

[25] In Kentucky, the jury is the sentencing authority. RCr 9.84; *see, e.g.*, *Cornelison* v. *Commonwealth*, 2 S.W. 235 (Ky. 1886). There are no standards or guidelines for the exercise of sentencing discretion. KY. REV. STAT. 532.070(1) permits a judge to reduce a jury sentence if it is "unduly harsh." However he can not impose a stiffer penalty. The trial judge said he "never had a case" where the jury volunteered "consecutive" sentencing [TE 1349].

sentence (20 years) for robbery, rape and sodomy also "to be served consecutively . . ." [TE 1347-48]. Co-defendant Stanford was similarly convicted but was sentenced to death on the murder conviction [TE 1542; R 397-400].

On appeal, the Kentucky Supreme Court held that in "a joint trial for capital murder where the death penalty is sought against one defendant, but not the other, the impaneling of a death-qualified jury does not deprive the [non-capital] defendant of the right to a trial by a fair and impartial jury selected from a fair cross-section of the community . . . Such a process furthers the interests of both the defendant[26] and prosecution . . ." [A 81-82]. *Buchanan*, 691 S.W.2d at 211-12.

The Court also held that reading the juvenile court competency exam to the jury in rebuttal was "proper" because "the objective observations" in the letter were admissible. Anyway, it was "harmless beyond a reasonable doubt . . . [since] the murder was well planned and premeditated."[27] *Estelle* v. *Smith*, 451 U.S. 454 (1981) was inapplicable since "the report contains no inculpatory statements . . . or any accusatory observation by the examiner . . ." and because Buchanan had already "waived his right to silence by giving the police a confession . . ." [A 84]. 691 S.W.2d at 213.

SUMMARY OF ARGUMENT

I. Death-Qualification

Unlike Ardia McCree, petitioner does not seek to topple a practice deemed essential to the state's concededly legitimate use of capital punishment. Rather, David Buchanan asks only that he not be unnecessarily and unfairly swept along by another's capital prosecution and tried before a tribunal, if not organized to convict, undeniably organized to punish with uncommon severity.

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[26] The Court did not explain how death-qualification served any interest of David Buchanan.

[27] The Court did not point to any evidence of this relevant to David. There was none.

Petitioner's primary reliance is upon the Sixth Amendment's guarantee of an impartial jury—both in guilt determination and, in Kentucky at least, sentencing. Common sense, experience, buttressed by uncontradicted social science evidence, demonstrates that death-qualified juries are, if nothing else, more punitive. Indeed, they are much more than that. Proponents of the death penalty are demonstrably more likely to treat the David Buchanans of the world—low status, juvenile, criminal defendant—more harshly, less likely to consider mitigating mental state evidence, and more likely to convict, and convict of the highest offense.

Unlike Ardia McCree, Buchanan does not argue in the abstract. This jury was not impartial—in a constitutional sense. This jury was unusually punitive, adopting a theory of maximum liabillity for Buchanan even the strong-armed prosecutor thought unsupported by evidence. The reason this jury was prosecution-prone is that 20% of the qualified panel was purged for reasons unrelated to Buchanan's case—solely because they held political or religious views otherwise entitled to constitutional protection.

Surely Buchanan is then entitled to some inquiry as to the state interest at stake. If so, petitioner must prevail because the cost to the state is slight. It appears that in the last 10 years of capital prosecutions in Kentucky this may be the only case where a non-capital accused was jointly tried with a capital defendant. At most, there are few. Available to the Commonwealth are numerous remedies—some of which do not involve separate trials: 1) simultaneous juries; 2) separate juries; possibly 3) a jury less than 12 for capital sentencing; 4) a non-unanimous sentencing jury; or 5) no death-qualification at all.

Buchanan also insists that due process was denied because without question there are fair-cross section, equal protection, and even First Amendment, ramifications from excusing 20% of the jurors due to their viewpoint on a controversial topic irrelevant to *this* defendant's case. Even if it is held that the excluded group is not sufficiently "distinct" to satisfy *McCree's* exacting standards, a large and important cross-section of the community was excluded from jury service in an American

courtroom. The overall extent of the fundamental unfairness must be recognized by the due process clause, even if each theory is rejected as separate, compartmentalized constitutional violations. This jury's age, racial, sexual and political orientation was demonstrably tilted by death-qualification.

Even if the practice is acceptable in a multi-defendant case such as this, the death-qualifying process employed below still offended due process. While 20% of the panel was excluded because of views on a punishment irrelevant to Buchanan, no voir dire was permitted on lesser, applicable penalties. No probing, thus no disqualification for cause or by right, was permitted on partiality toward the death penalty (life-qualification). Veniremembers were excused without stating they would not follow the law in violation of the limits set by *Witherspoon*, *Adams* and *Witt*. In the end, the jury itself was biased on both guilt and sentencing by this dramatic emphasis on the death penalty.

II. State's Use Of Competency Evaluation At Trial

Petitioner's argument that the State should not be allowed to use a competency evaluation to rebut a mental status defense is twofold: first, petitioner submits that *any* trial use by the State of a competency evaluation is fundamentally unfair since competency evaluations can be compelled, and further, are irrelevant to the issues presented by mental defenses; second, the unwarned use of a competency evaluation denies a criminal defendant the Fifth Amendment privilege to be free from self-incrimination, and denies the Sixth Amendment right to consult with counsel.

At trial, petitioner argued that he could not be guilty of any degree of homicide because he did not participate in the murder of the victim. Alternatively, petitioner argued that if the jury were to believe that he did participate in the murder (as they obviously did, having convicted him of intentional murder), then he could only be guilty of Manslaughter in the First Degree. In Kentucky, the crime of murder is distinguished from the crime of Manslaughter in the First Degree depending upon the presence or absence of emotional disturbance of the

perpetrator. In petitioner's case, he presented as his only defense witness a social worker who testified from records of the Commonwealth of Kentucky that petitioner was emotionally disturbed, exhibited thought disorders, and that some 4-1/2 months prior to the charged offenses, was pre-psychotic. Petitioner presented no evidence of a psychological or psychiatric nature which was obtained after the offenses were committed. Instead, petitioner relied solely upon records already existing at the time of the offense, having been obtained by the Commonwealth during petitioner's treatment as a delinquent juvenile.

The trial court, over petitioner's objection, allowed the prosecutor to use the report of a psychiatrist who evaluated petitioner pursuant to an order of the Juvenile Court for a competency evaluation. Petitioner was not advised that the State would make any trial use of the statements made to the psychiatrist. Nor was he informed that the psychiatrist's clinical observations or opinions might be used against him.

Clearly, evaluations of competency are fundamentally different than evaluations of a criminal defendant's mental state at the time of the offense. Competency evaluations work merely to protect the incompetent defendant from being tried, and consequently maintain the integrity of the criminal justice system. The test for competency is significantly different than the test of insanity. In fact, defendants who might otherwise be insane may be competent to stand trial.

Petitioner submits that to allow the use of competency evaluations by the State to rebut mental status defenses will ultimately pervert the due process considerations for the determination of competency, and may ultimately work to obstruct competency determinations in the first instance.

Further, petitioner submits that the unwarned use of a competency evaluation during the guilt/innocence phase of a criminal trial violates the defendant's Fifth Amendment privilege to be free from compelled testimony and his Sixth Amendment right to assistance of counsel.

ARGUMENTS

I.

PURGING 20% OF THE JURY PANEL (7 FOR CAUSE, 4 BY PEREMPTORY) DUE TO RELIGIOUS OR POLITICAL VIEWS ON CAPITAL PUNISHMENT VIOLATES THE FIRST, SIXTH AND FOURTEENTH AMENDMENTS WHEN ONE DEFENDANT IN A JOINT TRIAL DOES NOT FACE THE DEATH PENALTY.

Petitioner will not repeat the excellent submissions by respondent and amici in *Lockhart* v. *McCree*, 106 S.Ct. 1758 (1986), either as to analysis of precedent or discussion of social science literature on the general subjects of death-qualification and "conviction-proneness."[28] *McCree*, however, is the jumping off point not the end point for this case.

A. *McCree*

Unlike *McCree*, this case does not involve the possibility that the veniremembers in question "might frustrate administration of a state's death penalty scheme," *Wainwright* v. *Witt*, 105 S.Ct. 844, 848, 851 (1985). Nor does this action involve "that 'class' of veniremen whose views would prevent or substantially impair the performance of their duties . . ." *Witt*, 105 S.Ct. at 852, since the capital punishment attitudes of the venire were wholly irrelevant to Buchanan's case and since the trial court's summary exclusion procedure, coupled with the prosecutor's peremptory challenges, created a significant danger that the "class" was expanded beyond the narrow confines of *Witherspoon/Witt*. Nor does Buchanan argue "the right to be tried by jurors who have explicitly indicated an inability to follow the law and instructions . . ." *Lockett* v. *Ohio*, 98 S.Ct. 2954, 2960 (1978), since those excluded where fully qualified as to his case.

[28] Available to the Court and incorporated here, to the extent relevant, are the briefs and summaries of social science studies in the *McCree* appendix.

Unlike *Mccree*, Buchanan's claim does not rise and fall on "conviction-proneness."[29] Nor does he depend on presenting conclusive proof[30]—using actual jury deliberations.[31] Unlike *McCree*, the state interest here is slight—if it exists at all. The holding in *McCree*, 106 S.Ct. at 1764, was that "the Constitution does not prohibit . . . 'death-qualifying' juries in capital cases." Buchanan's was not a capital case.

B. Burden Of Proof

Assuming *arguendo* there are "serious flaws in the evidence[32] . . . that 'death-qualification' produces 'conviction--

[29] "In a large sense, death-qualification may have more to do with wrongful prison terms than with wrongful executions." That is so because "[i]t is plausible that juror characteristics can be particularly influential when juries are asked to distinguish among the lesser forms of homicide." Finch and Ferraro, *The Empirical Challenge to Death-Qualified Juries: On Further Examination*, 65 NEB.LAW. REV. 21, 61 (1986).

[30] The Court's "serious doubts about the value of . . . studies in predicting the behavior of actual jurors" must be read in the context of the "per se constitutional rule" sought by McCree. Surely, the Court's reliance on social science as an adjunct to judicial experience and common sense is firmly entrenched. *See Williams* v. *Florida*, 399 U.S. 78 (1970); *Colgrove* v. *Battin*, 413 U.S. 149, 160 n.15 (1973); *Ballew* v. *Georgia*, 435 U.S. 223 (1978).

[31] *Fay* v. *New York*, 332 U.S. 261 (1947) presented the "blue ribbon jury" for review. This panel was screened for "all who possess . . . such conscientious opinions with regard to the death penalty as would preclude finding a defendant *guilty* . . ." 332 U.S. at 267-68. So-called "nullifiers," which is a much narrower class than at issue here, *McCree*, 106 S.Ct. at 1764, didn't serve on the special panel. Complaint about sex discrimination—only 11% were women—was said to be "almost frivolous." *Fay*, 332 U.S. at 266 n.4. "*A more serious allegation* against the special jury panel is that it is more inclined than the general panel to convict." 332 U.S. at 278. "Extensive studies" were made by "the New York State Judicial Council" which "indicate[d] that special juries are prone to convict. In a study of certain types of homicide cases, it found that in 1933 and 1934, special juries convicted in eighty-three and eighty-two percent of the cases while ordinary juries . . . convicted in forty-three and thirty-seven percent respectively." 332 U.S. at 278, 279.

[32] It is not without significance that this Court, and others who have studied the issue, have not rejected out-of-hand the unquestionably impressive array of social science studies. *See, e.g.*, *Hovey* v. *Superior Court*, 616 P.2d 1301, 1341 (Cal. 1980) ["Most of the criticisms do not have merit."]. Nor does *McCree*, 106 S.Ct. at 1764 n.11, seriously dispute the " 'essen-

prone' juries," *McCree*, 106 S.Ct. at 1762, petitioner still must prevail. While the empirical evidence may not be sufficient to bar the practice in prosecutions where it is essential, surely the social science data, buttressed by "the more intuitive judgments of . . . judges,[33] defense attorneys, and prosecutors,"[34] is enough to carry the day in a non-capital case.

"In light of the presently available information," this Court is "not prepared to announce a *per se* constitutional rule requiring the reversal of every conviction" by a death-qualified jury.

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tial unanimity' of support among social science researchers and other academics for McCree's assertion that 'death-qualification' has a significant effect on the outcome of jury deliberations at the guilt phase of capital trials," (quoting the dissent, 106 S.Ct. at 1773). "[T]here are no studies which contradict" the empirical records developed in *Hovey*, *McCree* and *Keeton* v. *Garrison*, 578 F.Supp. 1164, 1171-79, *rev'd*, 742 F.2d 129 (4th Cir. 1984), *cert. denied*, 106 S.Ct. 2258 (1986). *See Grigsby* v. *Mabry*, 758 F.2d 226, 238 (8th Cir. 1985) *(en banc), rev'd, McCree*. This remains true.

One study not discussed in *McCree* is Bray and Noble, *Authoritarianism and Decisions of Mock Juries*, 36 JOUR. PERSONALITY & SOCIAL PSYCHOLOGY 1424 (1978) [Bray and Noble]. 280 students were divided into 6 member juries and categorized as high or low authoritarians. They listened to an audio-recording of a murder trial, made initial judgments, deliberated, and then announced verdicts. As other researchers discussed in Sec. C(ii) *infra*, Bray and Noble, at 1429, found "greater endorsement of the death penalty by high authoritarians." More importantly, again social science found that these jurors (high authoritarians) and juries "reached guilty verdicts more frequently." *Id.* at 1.

[33] The trial judge implied there are "prosecution-prone" jurors. In limiting each defendant to 5 peremptory challenges he said "there isn't . . . any inconsistency in the type of juror that [each defendant] would want" to strike [TH 3/9/82, 23].

[34] Recent studies have shown that "veteran" jury panels—those who have served in other cases—may perceive fundamental principles of law (i.e., presumption of innocence) differently from jury panels composed of citizens who have never served. Additionally, "[t]he results indicated that as the number of jurors with prior jury service increased there was a modest, but significant, increase in the probability of conviction." Dillehay and Nietzel, *Juror Experience and Jury Verdicts*, 9 LAW HUM. BEHAV. 179 (1985).

Buchanan objected to a panel "who has become prosecution oriented" by their length of service [TH 12/18/81, 36]. Nevertheless, most of the jurors called were on their very last day of jury service. Once again, social science demonstrates what trial lawyers and judges know from experience. The prosecutor below candidly admitted: "I would rather have [a juror] who has more experience. You get a brand new jury and . . . you say reasonable doubt and *everybody panics and gets hung up*" [TH 12/18/81, 37].

Witherspoon v. *Illinois*, 391 U.S. 510, 518 (1968). "It does not follow, however, that . . . petitioner is entitled to no relief" because there is no reason he should be held to such a high burden of proof. *Witherspoon*, 391 U.S. at 518. Since we seek so much less than McCree, we should be held to a lesser burden. *See generally Hovey*, 616 P.2d at 1308 n.37 ["substantial doubt" must be shown whether a death-qualified jury is neutral]. Second, Buchanan has certainly established a prima facie case, calling for rebuttal evidence from the State. *Cf. Castaneda* v. *Partida*, 430 U.S. 482, 498 (1977). Third, and most important, since there was little or no state interest in death-qualifying petitioner's jury, the Commonwealth must bear the burden of justifying the exclusion *and* of demonstrating lack of prejudice.[35]

C. Social Science Research

The death-qualified[36] are not just more prone to convict, as was the focus in *McCree*. Death-qualified jurors also share a "cluster" of pro-prosecution, anti-accused values—some of which are directly relevant to this case and not specifically in issue in *McCree*. *See, e.g.*, 106 S.Ct. at 1778 (Marshall J., dissenting). Principal among the findings, and crucial to Buchanan's argument—is that death-qualified juries tend to

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[35] Even "assuming . . . it is not currently possible to prove or disprove a relationship between death-qualification and prejudice" as to "conviction-proneness," and *McCree*, 106 S.Ct. at 1764 ["we will assume . . ."], did not go so far, "we choose the victor when we assign the burden of proof." Gillers, *Essay Review: Proving The Prejudice of Death-Qualified Juries After Adams* v. *Texas*, 47 U.PITT.L.REV. 219, 240 (1985). Since Buchanan did not face the death penalty, why should he have this burden?

[36] Existing research compares jurors who would be excused under the *Witherspoon* test (unwilling to impose a death sentence in *any* case) with other jurors. This research "may actually *understate* the magnitude of the problem raised by death qualification." Finch and Ferraro, at 62-63. "Contemporary research on death qualification is based on a study group defined more narrowly than in practice or, after *Witt*, as a matter of law." This is certainly true here because even if the exclusion met the *Witherspoon* standard, the prosecutor's peremptory strikes may legitimately be considered. See note 50.

give more harsh sentences than *Witherspoon*-excludables [WE's].[37]

i. Punitiveness and Pro-Death Penalty Views

Researchers have consistently and without exception found proponents of the death penalty more *punitive* than opponents. Wilson, *Belief in Capital Punishment and Jury Performance*, (unpublished, University of Texas)(1964) [Wilson]; Jurow, *New Data on the Effects of a "Death-Qualified" Jury on The Guilt Determination Process*, 84 HAR.L.REV. 657 (1971) [Jurow]; Fitzgerald and Ellsworth, *Due Process vs. Crime Control: Death-Qualification and Jury Attitudes*, 8 LAW HUM. BEHAV. 31 (1984) [Fitzgerald and Ellsworth]. "Death-qualified respondents were more punitive than excludable respondents—less likely to consider mercy, more likely to favor harsh punishment as a means of reducing crime, and more likely to believe in the strict enforcement of all laws, no matter what the consequences. These differences are dramatic." Fitzgerald and Ellsworth at 43-44.

ii. Authoritarianism And Pro-Death Penalty Views

Significantly, jurors who favor the death penalty tend to be more "authoritarian" than capital punishment opponents. "The more a subject is in favor of capital punishment, the more likely he is to be politically conservative, authoritarian and punitive in assigning penalties upon conviction." Jurow at 588. "A considerable body of research conducted since *Witherspoon* indicates that individuals who favor the death penalty have correlated attitudes which may bias them toward the prosecution. One such attitude, 'authoritarianism,' is characterized by conservatism, rigidity, moralism, punitiveness, intolerance of deviant behavior, and hostility toward low-status persons." Seguin and Horowitz, *The Effects of 'Death Qualification' on Juror and Jury Decisioning, An Analysis From Three Perspectives*, 8 LAW & PSYCHOLOGY REV. 49, 61 (1984). While the best predictor of voting severity (higher degree of offense)

[37] This proposition seems so obvious as to not need confirmation by social science. "[I]t is self evident . . ." *Witherspoon*, 391 U.S. at 518.

on the first ballot was a favorable attitude toward the death penalty, the legal authoritarianism score from Boehm's (1968) Legal Attitudes Questionnaire[38] also correlated with more severe first ballot votes. Cowan, Thompson, and Ellsworth, *The Effects of Death-Qualification on Jurors Predisposition to Convict and on the Quality of Deliberation*, 8 LAW HUM. BEHAV. 53, 69 (1984) [Cowan—deliberation]. "These two attitudes were highly intercorrelated (4 = .46, p.2.001)."

iii. Authoritarianism And Punitiveness

Researchers have repeatedly and consistently concluded that high authoritarians mete out more severe punishments than low authoritarians. Berg and Vidimar, *Authoritarianism and Recall of Evidence about Criminal Behavior*, 9 JOUR. OF RESEARCH & PERSONALITY 147, 151-152 (1975) [Berg and Vidimar]; McAbee and Cafferty, *Degree of Prescribed Punishment as a Function of Subjects Authoritarianism and Offenders Race and Social Status*, 50 PSYCHOLOGICAL REPORTS 651-654 (1982); Bray and Noble, 36 JOUR. PERSONALITY & SOCIAL PSYCH. at 1427 ["High authoritarians gave significantly longer sentences than low authoritarians."]; Mitchell and Byrne, *The Defendants Dilemma: Effects of Juror Attitudes and Authoritarianism on Judicial Decisions*, 25 JOUR. PERSONALITY 7 SOCIAL PSYCH. 123, 125-126 (1972).

iv. Authoritarianism And Dissimilar Defendants

Aside from their punitiveness, high authoritarians behave in other ways disturbing to all concerned about the fairness of our criminal justice system. They do not follow instructions to disregard evidence about the defendant's character. Mitchell and Byrne. In fact they are more inclined to punish severely when the defendant is dissimilar to themselves or has a perceived "bad character." Mitchell and Byrne. High authoritarians tend to base their verdicts on subjective impres-

[38] Boehm, *Mr. Prejudice, Miss Sympathy and the Authoritarian Personality: An Application of Psychological Measuring Techniques to the Problem of Jury Bias*, 3 WISC. L. REV. 734, 739-742 (1968) [Boehm].

sions of the defendant's character. Boehm at 746. Particularly relevant here is the finding that "high authoritarians are prone to place personal blame on juvenile delinquents and minimize the role of other contributing factors." Centers, Shomer, and Rodrigues (1970), cited in Berg and Vidmar at 148.[39] "It appears clear that high authoritarians, more often than low authoritarians, tend to respond with personal hostility to low status figures . . ." Roberts and Jessor, *Authoritarianism, Punitiveness and Perceived Social Status*, 56 JOUR. OF ABNORMAL & SOCIAL PSYCHOLOGY 311, 314 (1958). Berg and Vidimar also found that high authoritarians are more punitive to "low status" defendants. Unfortunately, David Buchanan falls into this category.

v. Authoritarianism And Mental-State Defenses

A critical area where the views of pro-death penalty jurors differ substantially from those of the death-scrupled is perspective on the insanity defense, and, by analogy, the type of mental state mitigation defense offered here. Early on Wilson found death penalty proponents more likely to reject the insanity defense. The 1971 Louis Harris and Associates poll found significantly more jurors who favored capital punishment mistrusted the insanity defense. And a recent study found death-scrupled jurors significantly more likely to vote not guilty by reason of insanity than were the death penalty proponents when the defense was psychologically based.[40] Ellsworth, Bukaty, Cowan, and Thompson, *The Death-Qualified Jury and the Defense of Insanity*, 8 LAW HUM. BEHAV. 81, 88-89 (1984). Jurors favoring the death penalty are much more likely to believe most defendants who plead not guilty by reason of insanity are not "really" insane. *Id.* at 89.

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[39] One study suggests a desire to avoid "anxiety laden situations . . . may steer authoritarian juries away from dealing with some important issues." Goldman, Freundlich and Casey, *Jury Emotional and Deliberation Style*, JOUR. PSYCHIATRY & LAW 319 (Fall 1983).

[40] Interestingly, there were no significant differences when organicity was the premise for the defense.

vi. Miscellaneous Views Of Death Penalty Supporters

Those inclined toward capital punishment are significantly predisposed to evaluate evidence more favorably to the prosecution. Thompson, Cowan, Ellsworth, and Harrington, *Death Penalty Attitudes and Conviction Proneness*, 8 LAW HUM. BEHAV. 95, 104 (1984). Moreover, the death-scrupled are more regretful than death penalty proponents for harsh errors in convicting when acquittal was appropriate or finding a higher degree of offense than was warranted. *Id.* at 107. On the other hand, the death-scrupled are less regretful for lenient errors. If these studies prove anything, it is that "a community made up exclusively of" the death-qualified "is different from a community composed of both . . ." *Ballard* v. *United States*, 329 U.S. 187, 193 (1946).

D. Impartial Jury

Unless *Witherspoon* and *Adams* v. *Texas*, 448 U.S. 38 (1980) are to be wholly repudiated, Buchanan was denied his right to an impartial jury. U.S. CONST., 6th AMEND. Even if it "has not been shown that this jury was biased with respect to . . . guilt . . .[41] [I]t is self-evident that, in its role as arbiter of . . . punishment . . . this jury fell woefully short of that impartiality to which the petitioner was entitled under the Sixth and Fourteenth Amendments." *Witherspoon*, 391 U.S. at 518.

Witherspoon involved a state procedure for selecting jurors in capital cases, where the jury did the sentencing and had comlete discretion . . ." *Adams*, 448 U.S. at 43. The same is true here, even though death was not a possible punishment. As in *Witherspoon*, "the jury assessed punishment at the same time it renders its verdict . . ." and had "unfettered discretion" in sentencing. *Adams*, 448 U.S. at 46. *Adams'* reaffirmation of *Witherspoon* was in a different context, where "the jury plays a somewhat more limited role . . ." one of "guided jury discretion." 448 U.S. at 47. Buchanan's jury had unbridled freedom in

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[41] Considering the empirical evidence of "conviction-proneness," in general, and this jury's actions in particular, Buchanan can not and does not concede this.

sentencing and, in this sense, his case is closer to Witherspoon's than Adams'.

The degree of jury discretion is relevant because *McCree* dictates so. McCree's criticism of death-qualification ultimately failed because "both *Witherspoon* and *Adams* dealt with the special context of capital sentencing, where the range of jury discretion . . ." was wider than it is in the determination of guilt and innocence. 106 S.Ct. at 1769. "[T]he traditional role of finding the facts and determining guilt or innocence . . . is more channelled." 106 S.Ct. at 1770. Therefore, the fatal flaw in McCree's case is precisely Buchanan's strength. "*Witherspoon* is not grounded in the Eighth Amendment . . . but in the Sixth Amendment. *Witt*, 105 S.Ct. at 852. Death-qualification most certainly "stacked the deck against the petitioner" exactly as meant by *Witherspoon*—on punishment. 391 U.S. at 523.

E. State Interest

Witherspoon immediately turned to the State's "justification . . . offered for the jury-selection technique it employed . . .", 391 U.S. at 518, as did *McCree* ultimately. 106 S.Ct. at 1768. The *McCree* Court posited three reasons why the state's valid interest outweighed any countervailing considerations recognized by *Witherspoon* and *Adams*. Only the first of these is arguably relevant:[42] "a single jury that could impartially decide all of the issues *in McCree's case*." 106 S.Ct. at 1768. Here the state's interest is much less. Rather than providing two juries in every capital case, Kentucky would, at worst, have to permit one separate trial for a non-capital co-defendant every few years.[43]

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[42] Buchanan had nothing to gain from "residual doubt," even if it existed, at the penalty phase since there was to be no bifurcated trial in his case. 106 S.Ct. at 1769. Nor is "consistency" a concern here. *Id.*

[43] The Department of Public Advocacy routinely provides extensive homicide date to the Kentucky Supreme Court in capital appeals as part of a challenge to the application of the death penalty statute and for use in proportionality review. While not of record here, the Attorney General is aware of this public information. There are, therefore, known to the Attorney General, *at least* 36 defendants who have received the death penalty, 61 who have received a lesser sentence after a penalty phase, and 23 others who have been convicted of manslaughter. Some of these cases involved joint trials. All

Theoretically, if Buchanan were to prevail, any decision would apply to those instances where the prosecutor "will request the death penalty in particular cases *solely* . . . [to] 'death-qualif[y]' the jury" only to waive the death penalty at the presentence hearing.[44] 106 S.Ct. at 1766 n.16. Putting aside the problems of proof, 106 S.Ct. at 1772 n.4 (dissent), hopefully such cases are rare.

Petitioner prays that the minimal expense of requiring some alternative procedure in these infringement situations not be held to outweigh the compelling case of prejudice he presents both in theory and in fact. Death-qualification, *in this case*, "sufficiently threatens . . . constitutional principles . . . that any countervailing interest of the State should yield." *Burch* v. *Louisiana*, 441 U.S. 130, 136 (1979). The alternatives are many and could have "accommodate[d] the State's legitimate interest in obtaining jurors who could follow their instructions and obey their oaths" as to *both* Buchanan and Stanford at little additional cost. *Adams*, 448 U.S. at 44.

First, and most obvious, a separate trial could have been granted. Separate trials are not unusual in other multi-defendant cases where constitutional rights are in danger.[45] *See Peo-*

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of the juries were death-qualified. To petitioner's knowledge, not a single capital case, other than this one, involved a co-defendant who was not "death-eligible." The reason is quite simply that, for other reasons, separate trials are granted or, much more likely, the less culpable co-defendants usually plead guilty. Respondent is free to point the Court to similar cases.

[44] This certainly occurs. *State* v. *Mercer*, 618 S.W.2d 1, 17 (Mo. 1981) (Seiler, J. dissenting) [discussing two such cases]. In at least three Kentucky cases prosecutors have "death-qualified" juries, obtained a conviction and dropped their request for the death penalty. *Commonwealth* v. *Whittinghill* (Muhlenberg Co. Ind. No. 82-CR-027) ["Man pleads guilty to murder charge," Lexington *Herald-Leader* at B2 (10-16-83)]; *Commonwealth* v. *Pennington* (Letcher Co. Ind. No. 84-CR-023) ["Pennington to serve at least 25 years," *The Mountain Eagle* at 1 (May 29, 1985)]; *Commonwealth* v. *Wilson* (Jefferson Co. Ind. No. 84-CR-1521), appeal pending. *See* also *Hicks* v. *State*, 414 So.2d 1137 (Fla.App. 1982); *Nettles* v. *State*, 720 (1966), *cert. dis. as improvidently granted*, 392 U.S. 616 (1967).

[45] It may well have been in the Commonwealth's interest to grant separate trials in this case for other reasons—because the defenses of Buchanan and Stanford were directly in conflict and because there were serious *Bruton* v. *United States*, 391 U.S. 340 (1968) problems when neither defendant testified

ple v. *Clark*, 402 P.2d 856 (Cal. 1965) [violation of speedy trial rights of one defendant not justified by need for joint capital trial].

Second, the analogous relief of a separate sentencing jury was requested. This would have conserved some time and expense as the guilt phase evidence need not have been repeated in full. The initial voir dire would have taken one-fourth the time. *McCree*, 106 S.Ct. at 1781 (dissent). Third, Buchanan asked, and the judge considered, death-qualification only after the guilt phase—with substitution of alternates[46] should any WE's be present on the guilt-finding jury assuming a conviction of intentional murder.

Fourth and fifth, if Stanford had been willing to waive jury unanimity in recommending punishment, or a 12 person jury for capital sentencing, Buchanan's interests could have been protected without any cost to the state.[47] Sixth, the most

but various confessions and admissions were introduced.

For example, in closing, Buchanan's counsel went after Stanford's "indignant" argument that Kevin was "set up" presumably by Buchanan. "It's not very indignant to brag and boast and laugh about sodomy" like Stanford did [TE 1289]. Again and again: "Who laughed about sodomizing the victim . . ." [TE 1294].

Without detailing the facts surrounding the *Bruton* issues, suffice it to say the prosecution may have endangered its case by insisting on a joint trial. *See, e.g., Byrd* v. *Wainwright*, 428 F.2d 1017 (5th Cir. 1970).

[46] The dissent in *McCree*, 106 S.Ct. at 1781, suggests this alternative. In *Peek* v. *Kemp*, 784 F.2d 1479 (1984) (*en banc*), the Eleventh Circuit upheld a death sentence where an alternate was substituted for a juror who allegedly was unable to continue in the midst of the penalty deliberations. In *Toole* v. *State*, 479 So.2d 731, 735 (Fla. 1985), the trial judge used exactly this procedure and the prosecutor had no trouble obtaining a death sentence.

[47] *Spaziano* v. *Florida*, 104 S.Ct. 3154 (1984), *Williams* v. *Florida*, 399 U.S. 78 (1970) and *Apodaca* v. *Oregon*, 406 U.S. 404 (1972), indicate that Kentucky could simply employ a jury of less than 12 or non-unanimous jury (as in Florida) for the sentencing portion of a bifurcated captial trial. KY. REV. STAT. [KRS] 532.025(1)(b) requires the jury "to recommend a sentence." There is no reason why this recommendation must be by 12—or all 12. If so, any "death-qualification" could occur *after* the guilt phase of a joint capital/non-capital trial such as this with no additional time or expense involved—indeed less: 12 instead of 46 interviews. Alternatively, with a non-unanimous jury, there seems no need for death-qualification at all.

On the other hand, if the capital defendant would waive a 12 member jury or a unanimous jury for sentencing, thereby avoiding death-qualification pre-

logical alternative, at little additional expense, would be to empanel simultaneous juries.[48] Finally, the state is always free not to death-qualify the jury at all.[49] As in *Ballew* v. *Georgia*, 435 U.S. 223, 243-244 (1978), the state's interest in saving "court time and . . . financial costs" is insufficient to outweigh the obvious prejudice in being tried before a death-qualified jury—even if such juries are only "somewhat" more likely to convict and punish severely than non-capital juries. *McCree*, 106 S.Ct. at 1764.

F. Fair Cross-Section

Buchanan's jury was, in attitude toward punishment (and a constellation of other criminal justice concepts) "unlike one chosen at random from a cross-section of the community . . ." *Witherspoon*, 391 U.S. at 517. A jury which is unnecessarily "culled of all who harbor doubts about the wisdom of capital punishment,"[50] 391 U.S. at 520, lacks the "common-sense judg-

guilt phase for his own case, no change in procedure would be required. *See Patton* v. *United States*, 281 U.S. 276, 293 (1930); *Short* v. *Commonwealth*, 519 S.W.2d 828 (Ky. 1975) [wavier of 12 person jury or unanimity possible]; *Ward* v. *Hurst*, 189 S.W.2d 594 (Ky. 1945) [no KY. CONST. right to jury on punishment].

[48] The "double jury procedure" is an effective and widely used "economy measure" which unquestionably upholds the due process rights of both defendants. *Smith* v. *DeRoberts*, 758 F.2d 1151 (7th Cir. 1985); *United States* v. *Lewis*, 716 F.2d 16, 19 (D.C. Cir. 1983); *United States* v. *Hayes*, 676 F.2d 1359, 1366 (11th Cir. 1982); *United States* v. *Rimar*, 558 F.2d 1271 (6th Cir. 1977); *United States* v. *Sidmon*, 470 F.2d 1158, 1167-70 (9th Cir. 1972). The only additional time would be spent in jury selection—and that would be shortened by keeping WE's for the non-capital panel.

[49] Some states operate capital punishment schemes without death-qualification. *See State* v. *Lee*, 60 N.W. 119 (Iowa 1894); *State* v. *Wilson*, 11 N.W.2d 737 (Iowa 1943); *State* v. *Garrington*, 76 N.W. 326 (S.D. 1898).

[50] It is legitimate to consider the prosecutor's peremptory strikes, to the extent (4 of 6) they can be linked to hesitation regarding the death penalty, because were it not for the joint trial, the Commonwealth would have had no opportunity to find out what the veniremembers views were—and therefore no opportunity to exclude these jurors either for cause *or by peremptory challenge*. *Cf. Batson* v. *Kentucky*, 106 S.Ct. 1712 (1986); *Harich* v. *Wainwright*, 106 S.Ct. 1092 (1986) (stay denied) (Powell J., concurring) ["The *Lockhart* issue was at least arguably presented when persons on the venire who expressed reservations . . . were removed by peremptory challenge."];

ment" and "public confidence" which comes from full "community participation" and "shared responsibility" essential to "group determination" of punishment. *Williams* v. *Florida*, 399 U.S. 78, 100 (1970); *McCree*, 106 S.Ct. at 1765, quoting *Taylor* v. *Louisiana*, 419 U.S. 522, 530-31 (1975).

There is no doubt that *Witherspoon*, in relying on the "cross-section" aspects of the problem, 391 U.S. at 519-521, recognized that death-scrupled citizens are a part of the community, a "broad categor[y] of persons", which must be represented on juries and not systematically swept from either the jury pool or panel.[51] *Duren* v. *Missouri*, 439 U.S. 357, 370 (1979); *Taylor*, 419 U.S. at 533-35. Petitioner's claim may not be based on so obvious a characteristic as skin color or sex. Nevertheless, what is in issue is a definable characteristic which, in a non-racist and non-sexist democratic society, is the most important of all—how a citizen thinks and feels about important issues. "[F]rom time to time other differences from the community norm may define other groups which need the same protection." *Hernandez* v. *Texas*, 347 U.S. 475, 478 (1954). Buchanan can prove what other cross-section cases can only assume—the presence of the excluded group can make a difference in the jury room.

Perhaps more important for conventional cross-section analysis, this exclusion process demonstrably changes the sexual, racial, age and political makeup of juries—and did so in this

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Winick, *Prosecutorial Peremptory Challenge Practices in Capital Cases: An Empirical Study and a Constitutional Analysis*, 81 MICH.L.REV. 1 (1981); *Crawford* v. *Bounds*, 395 F.2d 297, 301 (4th Cir. 1968); *McCree*, 106 S.Ct. at 1773-74 (dissent). Indeed, the "true impact of death-qualification . . . is . . . more devastating than the studies show . . ." at least in this case.

[51] If the exclusion is systematic, it seems to matter little whether it takes place before or after the names are placed in the drum. *McCree*, 106 S.Ct. at 1775 n.6 (dissent); *compare Fay*, 322 U.S. at 267-68, where the death-qualification was done before the jury panel was assigned to a particular courtroom. *See also People* v. *Fain*, 451 P.2d 65, 73 (Cal. 1969) [pre-screening jurors for views on death penalty].

case:[52] modestly as to sex but significantly as to race, age and

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[52] The Jefferson County, Kentucky, Clerk's Voter Registration Books reveal the race, sex, age and political party of the veniremembers excluded for cause, by peremptory and the actual jurors in this case:

a. Challenges For Cause

JUROR NO.	NAME	RACE	SEX	AGE AT TRIAL	PARTY
#192	Della Aspatore	W	F	65	Dem.
#124	David Cain	W	M	43	Dem.
#105	David Ehman	W	M	19	Dem.
#167	Sharon Englert	W	F	23	Dem.
#111	Belinda Roundtree	B	F	28	Ind.
#112	Louise Sebrey	W	F	56	Dem.
# 71	John Frye	B	M	38	Dem.
	b. Commonwealth Peremptory Strikes				
#145	Denise Cockerel	W	F	20	Dem.
#187	Amelda Kargl	W	F	49	Rep.
#135	James Roden	W	M	19	Dem.
# 70	Louise Williams	W	M	29	Rep.
	c. Jury				
# 26	Charles Kelly	W	M	52	Ind.
#193	Charles Cornish (foreman)	W	M	40	Rep.
# 73	Alice Eichenberger	W	F	55	Dem.
# 80	Franklin Sabol	W	M	39	Rep.
# 36	Robert Sands	W	M	60	Rep.
#128	Ethel Zimmerer	W	F	64	Dem.
# 38	Warren Adkins, Jr.	W	M	54	Dem.
# 81	Mary Mitchell	W	F	28	Dem.
# 46	Mary Quaife	W	F	58	Rep.
# 63	Donald Black	W	M	26	Dem.
#141	Donald Romans	W	M	32	Rep.
#182	Hazel Miles	W	F	49	Dem.

A majority of those excluded were women (6 of 11), young—under 30 (6 of 11) and overwhelmingly Democrats (8 of 11). More significantly, two blacks, who might have otherwise served on this all white jury, were eliminated. The actual jury was slightly less female (5 of 12), dramatically less young (2 of 12) and less Democratic (6 of 12) than it would have been but for death-qualification.

This microcosm of death-qualification appears to accurately reflect what the social scientists tell us. "Among the members of this excludable class are a disproportionate number of blacks and women," *McCree*, 106 S.Ct. at 1772 (dissent), as well as young people and Democrats. There is "evidence *of a strong political coloration* . . . Democrats favor capital punishment by a 2-to-1 margin while among Republicans support reaches 7-to-1 . . ." Gallup, THE GALLUP POLL (March 3, 1986).

political party. *Ballew's*, 435 U.S. at 237, concern for the "minority viewpoint", in a political sense, and "representation of minority groups", in a racial sense, is implicated here. "[C]ounterbalancing of various biases is *critical* to the accurate application of the common sense of the community . . ." 435 U.S. at 233-34. Wholesale exclusion of those "opposed to capital punishment" to one degree or another, "keeps an identifiable class of people off the jury . . ." and implicates "the established right of every criminal defendant to a jury drawn from a fair cross-section of the community." *Witt*, 105 S.Ct. at 861 (Brennan, J., dissenting).[53] "[S]ystematic . . . exclusion" of any "religious . . . [or] political . . . groups of the community" implicates the Sixth Amendment right to "an impartial jury drawn from a cross-section of the community." *Thiel* v. *So.Pac.Co.*, 328 U.S. 217, 220 (1946) [error to excuse day laborers].

G. Freedom Of Speech And Religion

McCree recognizes the legitimate "right as citizens" veniremembers have in not being unnecessarily excluded from criminal jury service. "[T]he removal for cause of [WE's] . . . *in capital cases* does not prevent them from serving . . . in other criminal cases . . ." There is no "substantial[54] deprivation of

[53] *McCree*, 106 S.Ct. at 1765, does not control because this case does not involve a "group defined solely in terms of shared attitudes that would prevent or substantially impair members of the group from performing one of their duties as jurors . . ." As to Buchanan, WE's "were excluded for reasons completely unrelated to the ability of members of the group to serve as jurors . . ."

[54] Petitioner must respectfully disagree. Jurors in capital cases play significantly greater role in the criminal justice system than jurors in non-capital cases. The power of life and death over a fellow citizen is not the only difference. Capital trial jurors command the attention of the public and speak with authority, sometimes, on important issues in the criminal justice system. Recently, capital trial jurors led a successful fight to change Kentucky Criminal Procedure. "After emotional testimony from [seven] jurors in [a capital] murder trial, a House committee . . . approved a bill to allow juries to be told about a defendant's criminal record and parole eligibility before they recommend a sentence." Louisville *Courier Journal* at 1 (3/14/86). "Bill passed to get tough with criminals." Lexington *Herald-Leader* at B1 (3/22/86). These jurors help shape public opinion. They are perceived as spokespersons for the non-legal community. "2 say jury believed Taylor would kill again." Louisville *Times* at B1 (5/1/86).

their basic rights of citizenship" since they are "unable to follow the law . . ." 106 S.Ct. at 1766. *Cf. Batson*, 106 S.Ct. at 1724 ["discrimination against black *jurors*"]. Here, at least as to petitioner's case, the jurors in question were not unqualified. They had a constitutional right to serve. *Carter* v. *Jury Commission*, 396 U.S. 320 (1970); *Turner* v. *Fouche*, 396 U.S. 346 (1970). While racial discrimination was not involved, except indirectly, constitutionally protected speech and religious beliefs were. Exclusion of citizens due solely to political or religious beliefs,[55] in this context, "is at war with our basic concepts of a democratic society and a representative government." *Smith* v. *Texas*, 311 U.S. 128, 130 (1940). *Cf. Torcaso* v. *Watkins*, 367 U.S. 488 (1961).

Participation of WE's in non-capital prosecutions is critically important to "preserving 'public confidence in the *fairness* of the criminal justice system'" and implementing the Court's "belief that 'sharing in the administration of justice is a phase of civic responsibility.'" *McCree*, 106 S.Ct. at 1765, *quoting Taylor*, 419 U.S. at 530-31.

H. Equal Protection

"[T]he evidence suggests that 'death-qualification' will disproportionately affect the representation of blacks on capital juries" *McCree*, 106 S.Ct. at 1779 (dissent). This is both true in theory, and in fact—at least in this case. Since this black defendant was ultimately tried by an all white jury, there are undeniable equal protection concerns at stake. While the discrimination may be indirect and perhaps not intentional, in contrast to *Batson*, it is equally unnecessary and similarly prejudicial. The reduction in minority representation has "con-

[55] *See Schowgurow* v. *State*, 213 A.2d 475 (Md. 1965) [Maryland constitutional provision requiring belief in God for jury service violated due process]; *Juarez* v. *State*, 277 S.W. 1091 (Tex. 1925) [exclusion of Roman Catholics from jury denied due process]; *Smith* v. *Sisters of Good Shepherd*, 87 S.W. 1083 (Ky. 1905) [no error in refusing to exclude Catholics from jury where defendant was a Catholic institution]; *State* v. *McCarthy*, 69 A. 1075, 1076 (N.J. 1908) ["fundamental principles" required dismissal of indictment by grand jury from which rival political faction excluded].

stitutional significance", especially where the defendant is black. *Ballew*, 435 U.S. at 239.

Aside from race, Buchanan is denied equal protection in the sense that he has been singled out for a joint trial before a less "favorable" jury [A 6]. "[A] discretion, even if vested in the court, to shunt a defendant before a jury so chosen as greatly to lessen his chances while others accused of a like offense are tried by a jury so drawn as to be more favorable to them, would hardly be 'equal protection of the law.'" *Fay*, 332 U.S. at 285. Equal protection is also denied since the exclusion falls along party lines and strips a certain political viewpoint of their "right to vote" as jurors. *Cf. Karcher* v. *Daggett*, 462 U.S. 725, 746 (1983) (Stevens, J., concurring); *Carrington* v. *Rash*, 380 U.S. 89 (1965).

I. Due Process

Admittedly complaining about exclusion of a group not yet legally "cognizable" for "fair cross-section" purposes, Buchanan alternatively submits that the death-qualification in his case violated fundamental fairness and thus due process. Unlike women or Mexican-Americans, a "significant difference in viewpoint between those permitted to serve has been proved . . ." *Fay*, 332 U.S. at 291-92. In this sense, Buchanan presents a more compelling constitutional claim that must be recognized by due process.[56] "The nature of the classes excluded *was* . . . such as was likely to affect the conduct of the . . . jury . . ." *Rawlins* v. *Georgia*, 201 U.S. 638 (1906).

The second prong to this due process analysis is the concept of impartiality. "Long before this Court held" the Sixth Amendment Impartial Jury Clause applicable to the States, "it was well established that the Due Process Clause" protected the right to an impartial decisionmaker and against "circumstances that create the likelihood or the appearance of bias." *Peters* v. *Kiff*, 407 U.S. 493, 502, 503 (1972). *Cf.* pre-*Duncan*

[56] In this case, the exclusion raised more than "the *possibility* that the composition of juries would be arbitrarily skewed" in a way actually detrimental to criminal defendants. *McCree*, 106 S.Ct. at 1765.

cases: *Parker* v. *Gladden*, 385 U.S. 363 (1966); *Turner* v. *Louisiana*, 379 U.S. 466 (1965). This "fundamental fairness" approach has been applied to jury selection practices that only raise the "potential for a conviction-prone jury." *Henson* v. *Wyrick*, 634 F.2d 1080, 1082, 1084 (8th Cir. 1980) [sheriff or his deputy picked bystander jurors]. The "unmistakable import" of pre-*Taylor* cases "is that due process and equal protection prohibit jury selection systems which are *likely* to result in biased or partial juries." *Taylor*, 419 U.S. at 540 (Rehnquist, J., dissenting). This is such a case.

J. Unconstitutional Death-Qualification Under Witherspoon/Adams/Witt

i) One-Sided Punishment Qualification

Jury selection is, in its essence, a "quest . . . for jurors who will conscientiously apply the law and find the facts . . ." *Witt*, 105 S.Ct. at 852. Thus, "death-qualification" is "no different from excluding jurors for innumerable other reasons which result in bias . . ." 105 S.Ct. at 855. Viewed in light of *Adams* and *Witt*, "death-qualification" is a misnomer. If there is to be "punishment-qualification" it must be even-handed. The trial judge here asked only of the death penalty, rejecting tendered questions on the entire punishment range of 20 years to death.[57] Perhaps more important, he asked only of views opposed to the death penalty—not about extreme support for execution. The trial judge "crossed the line of neutrality" and "produced a jury uncommonly willing" to impose the maximum sentence for the highest degree of the offense. *Witherspoon*, 448 U.S. at 520, 521.

The trial court's anomalous approach, at least as to Buchanan, of qualifying the venire only on attitudes regarding an irrelevant punishment denied due process. "It is fundamentally unfair" for the state to employ such a potent, yet one-

[57] It seems reasonable to argue that as many jurors may be "substantially impaired" in their punishment function due to the 20 year option as are by the death option considering the facts of this case. *Witt*, 105 S.Ct. at 850.

sided, skewing procedure. *Cf. Wardius* v. *Oregon*, 412 U.S. 470, 475-76 (1973).

There is little doubt under *Witt* that veniremembers must be disqualified for views in favor of the death penalty[58]—as well as the opposite. "I would not dream of foisting on a criminal defendant a juror who admitted that he had conscientious or religious scruples against not inflicting . . . death . . ."[59] *Witherspoon*, 391 U.S. at 536 (Black, J., dissenting).

Prior to *Witherspoon*, the 4th Circuit recognized the unfairness of a one-sided qualification process. Each of the jurors in *Crawford* v. *Bounds*, 395 F.2d 297, 301 (4th Cir. 1968) (*en banc*) "professed a belief in capital punishment. Indeed, one . . . stated he believed . . . 'an eye for an eye', and that it would be his duty" to vote for death. *Id.* The 4th Circuit unanimously found "*a double standard of inquiry*" because the judge's questions did not focus on pro, as well as anti-death penalty views and held that the jury was selected in an "inherently unfair manner." 395 F.2d at 303. *See Hance* v. *Zant*, 696 F.2d 940, 956 (11th Cir. 1983) ["[T]he . . . [*Adams*] standard should apply to a veniremember in favor of the death penalty."]; *Pope* v. *United States*, 372 F.2d 710, 725 (8th Cir. 1967) (*en banc*) (Blackmun, J.) *vacated*, 392 U.S. 651 (1968) ["Among those excused . . . were three persons who indicated a tendency toward insistence on capital punishment, apart from other evidence . . ."]; *United States* v. *Puff*, 211 F.2d 171, 182 (2nd Cir. 1954) ["Nor

[58] Sixty-five years ago this Court said "it may well be" that a challenge for cause to a veniremember who was "in favor of nothing less than capital punishment" should have been sustained. *Stroud* v. *United States*, 251 U.S. 15, 20-21 (1919).

[59] Yet, how are we to know unless we ask questions? Little can be gleaned from the uniform "no" answers to the trial judge's single inquiry—except in a few cases where the juror's response implied, perhaps, some degree of enthusiasm. "I could render a death sentence" [TE 97]. "I do not object to the death penalty;" and later "I think it is a very serious crime" [TE 127, 128]. No "difficulties with that" [TE 222]. "I did on one case one time" [TE 164]. A recent Media General—Associated Press poll found that 27% of the public indicated the death penalty should be used in *all* murder cases. Lexington *Herald-Leader* A2(1/29/85). *Adams*, 448 U.S. at 50, suggests otherwise. At any rate, the "question is not one of statistical parity, but of logical consistency." 448 U.S. at 55 (Rehnquist, J., dissenting).

was the selection of the jury unfair in that only those with scruples or bias *against* capital punishment were excused.]; *Patterson* v. *State*, 283 So.2d 212 (Va. 1981) [error to refuse questions designed to expose cause challenges to pro-death jurors]; *Poole* v. *State*, 194 So.2d 903, 905 (Fla. 1967) [voir dire on "mercy" required]; *Pierce* v. *State*, 604 So.2d 185 (Tex. Crim. App. 1980) [automatic death (ADP) juror should have been excused]; *O'Connell* v. *State*, 480 So.2d 1284, 1287 (Fla. 1986) [3 ADP's should have been excused].

ii) Refusal To Ask Whether The Excluded Veniremembers Could Follow The Law

"[I]t is entirely possible that a person who has a 'fixed opinion against' . . . capital punishment might nevertheless be perfectly able . . . to abide by existing law . . ." *Boulden* v. *Holman*, 394 U.S. 478, 483-484 (1969). "*It is important* to remember that not all who oppose the death penalty are subject to removal for cause . . . those who firmly believe that the death penalty is unjust may nevertheless serve as jurors in capital cases so long as they state clearly that they are willing to temporarily set aside their own beliefs in deference to the rule of law." *McCree*, 106 S.Ct. at 1766.

Buchanan's venire never got a chance to "state clearly" their answer to this crucial question because the judge wouldn't ask whether they could "subordinate . . . personal views . . . [and] abide by [the] oath as a juror and to obey the law of the State . . ." *Witherspoon*, 391 U.S. at 514-15 n.7. *Cf. Turner* v. *Murray*, 106 S.Ct. 1683 (1986). *Compare Patton* v. *Yount*, 104 S.Ct. 2885, 2893 (1984) [Jurors with opinions on guilt could "lay aside . . . opinion[s] and render a verdict based on the evidence . . ." quoting *Irvin* v. *Dowd*, 366 U.S. 717, 723 (1961).]; *see* also *Murphy* v. *Florida*, 421 U.S. 794 (1975).[60] This failure

[60] Contrast the approach taken by the trial judge in "rehabilitating" a juror unfavorable to the defendant after she said she might have formed an opinion from pretrial publicity. THE COURT: "[I]f my instructions . . . [are] that you have to put out of your mind anything that you heard or read . . . could you do that?" [TE 128]. This is the uniform approach taken under Kentucky law to other issues. *See, e.g., Caldwell* v. *Commonwealth*, 634 S.W.2d 405, 407 (Ky. 1982) ["That is not the point. Can you lay aside . . ."].

seems fatal under McCree's impartiality analysis. 106 S.Ct. at 1767.

iii) "A Broader Basis"

As the abbreviated colloquies [A 29-37] indicate, there can be no assurance that the 7 jurors in question were not excluded on "'any broader basis' than inability to follow the law . . ." *Adams*, 448 U.S. at 49; *Witherspoon*, 391 U.S. at 522. No input from defense counsel was permitted.[61]

Of special concern is that the judge's two-part question focused on "this case." But "this case" involves a juvenile defendant. If the panel is to be purged of all those who have substantial qualms about executing children, we truely have a "hanging jury" in the *Witherspoon*, 391 U.S. at 523, sense. A juvenile's youth, after all, is his most powerful mitigating circumstance.[62]

iv) Process Effects

Death-qualification in this case could only have served to confuse and mislead the jury. Veniremember Cain: "Is that what this case is about . . .?" [A 31]. The approach taken by the trial judge did not distinguish between the defendants. The veniremembers could have only concluded that all this discussion of the death penalty applied equally to Buchanan. "There is considerable evidence that the very process of determining

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[61] The Court has often relied upon defense counsel's implicit satisfaction with a veniremember's allegedly ambiguous response. "Defense counsel did not . . . attempt rehabilitation." *Witt*, 105 S.Ct. at 848, 856. While this doesn't suggest defense input is constitutionally necessary, the judge should be held to a strict standard if he decides to "go it alone."

[62] Even follow up questions focused on "this case": "Do you think it would be . . . impossible for you to decide on the death penalty in this case?" [A 31]. In *Ice* v. *Commonwealth*, 667 S.W.2d 671, 676 (Ky. 1984), involving another juvenile defendant, "in this case" questions were condemned in an opinion joined by the trial judge, sitting as justice of the Kentucky Supreme Court. *See* also *Jaggers* v. *Commonwealth*, 439 S.W.2d 580 (Ky. 1968), *rev'd*, 403 U.S. 946 (1971) ["in this case" question].

Obviously, a veniremember's views can change depending on what "this" case is. *See*, for a sad example, *Owens* v. *Commonwealth*, 277 S.W. 304 (Ky. 1925) [Excused as death-scrupled in a white defendant case, the same juror votes for death for a black defendant two days later].

[who the WE's are] . . . predisposes jurors to convict." *McCree*, 106 S.Ct. at 1780 (dissent). *See* Haney, *On the Selection of Capital Juries: The Biasing Effects of the Death-Qualification Process*, 8 LAW & HUM. BEHAV. 121 (1984); *Hovey*, 616 P.2d at 1349.

CONCLUSION

Given the various constitutional rights at stake, it is difficult to fit all within a "single analytical umbrella."[63] *Peters* v. *Kiff*, 407 U.S. 493, 500 (1972). Petitioner suggests the Due Process Clause. Whatever constitutional handle one attaches to the problem presented by this case, one fact is clear. David Buchanan was prejudiced. He not only demonstrated "a substantial threat" to his basic rights, but a case-related denial of his "Sixth and Fourteenth Amendment rights to a fair jury trial." *Compare McCree*, 106 S.Ct. at 1779 (dissent).

II.

PETITIONER'S CONVICTION WAS OBTAINED IN VIOLATION OF DUE PROCESS OF LAW AND THE FIFTH AND SIXTH AMENDMENTS WHERE EVIDENCE OBTAINED FROM A POST-ARREST COMPETENCY EVALUATION WAS USED AGAINST HIM AT TRIAL.

At the time of petitioner's trial, the absence of extreme emotional disturbance was an element of the offense of murder. KRS 507.020; *Edmonds* v. *Commonwealth*, Ky., 586 S.W.2d 24 (1979).[64] Although petitioner argued that he was not guilty of

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[63] Perhaps this is not necessary. This Court has employed a "hybrid doctrine" in analogous cases before. *Duren*, 439 U.S. at 372 (Rehnquist, J., dissenting).

[64] The Kentucky Supreme Court purportedly overruled *Edmonds* in *Wellman* v. *Commonwealth*, Ky., 694 S.W.2d 696 (1985), in holding that absence of extreme emotional distress is not an element of the crime of murder. Nonetheless, the Court, citing *Gall* v. *Commonwealth*, Ky., 607 S.W.2d 97 (1980), stated that "an instruction on murder need not require the jury to find that the defendant was not acting under influence of extreme emotional disturbance, unless there is something in the evidence to suggest that he was, thereby affording room for a reasonable doubt in that respect." *Wellman* at 697. The Court apparently placed the burden of going forward on the defendant, and in such event, placed the burden of non-persuasion on the Common-

any homicide, he called Ms. Elam, a social worker, as his only defense witness in order to establish that, *if* the jury were to believe that he were otherwise guilty of murder, he was acting under the influence of extreme emotional disturbance, and could therefor be guilty only of Manslaughter in the First Degree.[65]

Ms. Elam testified that petitioner had been committed to the Department on May 1, 1980, and was placed at a Youth Development Center in Danville, Kentucky. Approximately one month later, petitioner was evaluted by a psychologist, Dr. Michael Nietzel. The test results showed petitioner to have an IQ of 74. Dr. Nietzel interpreted the test results in tems of "emotional disturbance" and a "mild thought disorder."

Petitioner was transferred to Northern Kentucky Treatment Center, a facility for emotionally disturbed youths, where he was evaluated by Dr. Robert Noelker. Dr. Noelker concurred in Dr. Nietzel's previous diagnosis of thought disorder. Further, Dr. Noelker found Petitioner to be "pretty severely emotionally disturbed . . . very easily confused . . . extremely limited capacity for insight . . . [and] easily lead by other more sophisticated delinquents or youths" [A 65]. Dr. Noelker's report was dated August 21, 1980 [A 64], some 4½ months prior to the offenses for which the petitioner stood trial.

During cross-examination of Ms. Elam, the prosecutor was allowed, over petitioner's objection, to elicit the results of another evaluation, performed *subsequent* to petitioner's arrest, the purpose of which was to determine whether or not the child was competent to understand the juvenile waiver proceedings and to assist his attorney, and further, to deter-

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wealth. Petitioner submits that the holding in *Wellman* in no way affects the disposition of petitioner's case, since he in fact did go forward with evidence of extreme emotional disturbance, and therefore, the trial court properly instructed the jury under either *Edmonds* or *Wellman*.

[65] Pursuant to KRS 507.020, both wanton murder and intentional murder are punishable by imprisonment for 20 years to life. KRS 507.030, on the other hand, provides that Manslaughter in the First Degree is punishable only by 10 to 20 years imprisonment.

mine whether or not David met the criteria for involuntary commitment pursuant to KRS Chapter 202A.[66]

After petitioner's objection was overruled, Ms. Elam was allowed to read to the jury Dr. Lange's report, which provided in part "David was appropriate inneractionally [sic] . . . He was in good reality contact and reasonable knowledge of current events outside the center and seemed to be functioning in full normal I.Q. range. Short and long term memory appeared intact. There was not evidence of hallucinations or delusions. Affects was . . . generally shallow without imporia or disporia" [A 59].

Importantly, the evaluations and tests used to establish petitioner's mental status shortly before the offenses in question were *not* procured at the instance of petitioner or his counsel in order to prepare a defense to the charges. Rather, they had been obtained incident only to the State's custody of David as a result of his delinquent juvenile status. Accordingly, there can be no inference of feigning, fabrication, or malingering in order to "manufacture" a defense to the charges in question.

Petitioner submits that he was particularly prejudiced by the evidence contained in the report of Dr. Lange's competency evaluation. Dr. Lange's report was the only evidence upon which the jury could possibly have relied to find the absence of emotional disturbance in convicting petitioner of intentional murder.

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[66] At the time of the juvenile proceedings, David Buchanan was still a ward of the State pursuant to his earlier commitment. Because he was being held in a juvenile detention facility, inquiry was made to see whether he might be involuntarily committed to a state mental hospital or institution. KRS 202A.026 provides that:

> No person shall be involuntarily hospitalized unless such person is a mentally ill person:
>
> (1) Who presents a danger or threat of danger to himself, family or others as a result of the mental illness;
>
> (2) Who can reasonably benefit from treatment; and
>
> (3) For whom hospitalization is the least restrictive alternative mode of treatment presently available.

Dr. Lange determined that David did not meet the criteria for involuntary commitment, without specifying which criteria were not met, or why he felt that David did not meet the criteria.

(i) The Court Should Adopt A Per Se Rule Barring The Use Of Competency Evaluations As Evidence Of A Defendant's Mental Status At The Time Of An Alleged Defense.

It is elementary, of course, that the conviction of a person while he is legally incompetent violates the guarantee of due process. *Pate* v. *Robinson*, 383 U.S. 375 (1966); *Bishop* v. *United States*, 350 U.S. 961 (1956). In order both to protect an incompetent defendant and to maintain the integrity of criminal proceedings, this Court has placed an obligation upon trial courts to determine competency. In appropriate circumstances, a trial court must act *sua sponte*. *Pate* v. *Robinson*, *supra*. In order that trial courts can meet this obligation, the use of compelled competency examinations have been upheld. *See e.g.*, *United States* v. *Cohen*, 530 F.2d 43 (CA5, 1976), *cert. denied* 429 U.S. 855 (1976); *United States* v. *Albright*, 388 F.2d 719 (CA5, 1968).

Needless to say, if this Court allows any trial use of the results of a competency evaluation, defendants and their counsel will be extremely hesitant to request competency evaluations, even where the need is indicated. Further, this may well result in a situation where defendants refuse to participate, and "sandbag" any issue of competency until after a finding of guilt. This would effectively vitiate the import of this Court's holding in *Pate* v. *Robinson*, and render the competency evaluation a tool of defendants and their counsel to use tactically as they saw fit. Since competency cannot be waived,[67] defendants who refused to participate would then raise the issue in post-conviction proceedings. Simply put, this would result in an intolerable burden on the effective administration of criminal justice.

Furthermore, if the state is allowed to use the results of a competency evaluation to rebut evidence of a mental status defense (i.e., in this case, extreme emotional disturbance), a

[67] ". . . [I]t is contradictory to argue that a defendant may be incompetent, and yet knowingly and intelligently 'waive' his right to have the court determine his capacity to stand trial." *Pate* v. *Robinson*, *supra*, 86 S.Ct. at 841, citing *Taylor* v. *United States*, 282 F.2d 16, 23 (C.A. 8th Cir. 1960).

jury almost certainly will be confused by evidence of competency versus evidence pertaining to culpability for an offense. Obviously, "[t]here is a vast difference between that mental state which permits an accused to be tried and that which permits him to be held responsible for a crime." *Winn* v. *United States*, 270 F.2d 326, 328 (CADC, 1959). See also *United States ex rel Mireles* v. *Greer*, 736 F.2d 1160 (CA7, 1984). "[T]here is a difference between the concept of 'insanity' and mental competency to stand trial. The former concept relates to the merits of the case. . . . Mental competency to stand trial, on the other hand, implicates constitutional standards with regard to procedural fairness. A showing that an accused is mentally incompetent to proceed to trial does not establish a defense to the substantive charge, but rather mandates a continuation of the trial until such time as the accused is mentally capable of proceeding." *Davis* v. *Campbell*, 465 F.Supp. 1309, 1317 (E.D. Ark., 1979). Otherwise stated, "a person's mental competency to stand trial and his mental condition at the time the offenses were committed are *two fundamentally different issues*." *Wood* v. *Zahradnick*, 475 F.Supp. 556, 558 (E.D. Va., 1979).[68] In fact, the Fifth Circuit Court of Appeals has emphasized that "trial courts should be vigilant in minimizing unnecessary references to competency issues. References that are irrelevant and are elicited in bad faith may indeed have a prejudicial effect on the defendant's right to a fair trial on the issue of sanity. This must not be tolerated." *United States* v. *Fortune and Barfield*, 513 F.2d 883, 888-889 (CA5, 1975). In *Fortune*, despite the references to a competency evaluation, the Fifth Circuit affirmed the defendant's conviction. However, there were cir-

[68] That jurors would be confused by the introduction of evidence from a competency evaluation, introduced to rebut evidence on a mental status defense, should come as no surprise. Apparently, the medical profession itself often confuses the two legal concepts. As one commentator has noted, "Indeed, there is repeated evidence that psychiatrists often misunderstand the tests of incompetency and confuse it with the test of criminal responsibility." Note, 81 Harv. L. Rev. 454, 470 (1967); See also Robey, *Criteria for Competency to Stand Trial: A Checklist For Psychiatrists*, 122 Am. J. of Psychiatry 616 (1965). Of course, because the State never called Dr. Lange as a witness, petitioner was unable to confront or cross-examine him as to the basis of his opinion, further compounding the prejudice.

cumstances in *Fortune* not present herein. In the first place, the trial court had ordered the defendants evaluated to determine *both* competency to stand trial *and* sanity at the time of the offense. The defendants had called as their witness the psychiatrist who had evaluated them. The psychiatrist was asked on cross-examination by the government's counsel the reason for his examining Barfield. The doctor replied that he was referred for "a psychiatric evaluation to determine whether he was competent to stand trial." When defense counsel objected, the trial court "told counsel that the prosecution was entitled to cross-examine the witness, but that he did not want to get into the issue of competency to stand trial *because it had no bearing on the case.*" *Id* at 887. In affirming, the Fifth Circuit stated that:

> While we agree with Barfield that any reference to a competency examination is undesirable in the context of a defense based on insanity, we think that the statutory construction he suggests is both unwarranted and unrealistic. In circumstances, as here, where the same psychiatrist has examined the defendant to determine sanity at the time of the offense, as well as competency to stand trial, it may well be impossible to prevent all references to the fact of a competency examination. Indeed, judicial gymnastics directed toward the annihilation of all such references may, in some circumstances, have a more undesirable effect, in terms of distortion of testimony, than would the references themselves. *Id* at 887.

Unlike the facts in *United States* v. *Fortune*, *supra*, the reference to the competency evaluation in petitioner's case was not limited to merely demonstrating the circumstances in which the psychiatrist, Dr. Lange, came to examine petitioner. In contradiction of the earlier evaluations, the jury heard that Dr. Lange was of the opinion that petitioner demonstrated "appropriate interaction," "good reality contact," and exhibited a "full normal I.Q. range."

At trial, the absence of emotional disturbance was an ultimate material fact which the state was obligated to prove in order to convict petitioner of intentional murder. The Commonwealth sought to disprove the presence of emotional disturbance at the time of the offense by showing that petitioner was

competent to stand trial. However, whatever basis Dr. Lange relied upon in his determination of petitioner's competency is not relevant to a pre-existing emotional disturbance. Clearly, even an extremely emotionally disturbed person m[illegible] be competent. In reality, very few criminal defendants who are mentally or emotionally impaired are ever found to be incompetent to stand trial. As stated by a prominent clinical professor of psychiatry, "[e]ven a man floridly psychotic and plagued by hallucinations may very well comprehend, for example, that he is being charged with murder, that the evidence for and against this charge will be presented to twelve people who will then sit in judgment upon him, and that his life may depend upon his testimony and upon his telling his attorney all that he can about himself and his role, if any, in the offense charged against him. Neither amnesia nor an incredibly fantastic concept of his activities at the time of the offense necessarily denies the accused his right to stand trial, though clearly either may add significantly to the burdens of defense counsel." Blinder, M.D., Psychiatry In The Every Day Practice of Law, 2nd. Ed., § 7.3, pp. 303-304, (1982).

This Court should not countenance the State's use of evidence which is not only irrelevant to any issues invovled in the case, but further, when that very evidence comes into being only because a court has exercised its constitutional mandate in attempting to determine the competency of a criminal defendant to proceed to trial. The constitutional guarantee of due process acts as a shield to protect defendants from being tried while incompetent; the State should not be allowed to batter and twist that shield into a sword to be used by the State against that very defendant.

(ii) The Use Of An Unwarned Competency Evaluation Violates The Defendant's Fifth Amendment Privilege To Be Free From Compelled Testimony And Also His Sixth Amendment Right To Assistance Of Counsel.

This Court has already determined that an unwarned pretrial psychiatric evaluation cannot be used in the sentencing

phase of a capital proceeding. *Estelle* v. *Smith*, 451 U.S. 454 (1981).

Of course, it is of no consequence that the competency evaluation was used during the trial in chief herein rather than during sentencing: "We can discern no basis to distinguish between the guilt and penalty phases . . . so far as the protection of the Fifth Amendment privilege is concerned." *Estelle*, *supra*, 101 S.Ct. at 1873.

In *Estelle*, Dr. Grigson, who had interviewed Smith prior to trial to determine his competency, testified based upon information he derived from the "mental status examination" of Smith. Dr. Grigson informed the jury of his diagnosis of Smith, his opinion as to Smith's poor prognosis, and Smith's lack of remorse.

On appeal, this Court specifically refuted the State's contention that neither the Fifth nor the Sixth Amendments were implicated. With regard to the Fifth Amendment, this Court observed that:

> In Miranda v. Arizona, [cite omitted], the court acknowledged that "the Fifth Amendment privilege is available outside of criminal court proceedings and serves to protect persons in all settings in which their freedom of action is curtailed in any significant way from being compelled to incriminate themselves." Miranda held that "the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." [Cite omitted]. Thus, absent other fully effective procedures, a person in custody must receive certain warnings before any official interrogation, including that he has a "right to remain silent" and that "anything said can and will be used against the individual in court." [Cite omitted]. The purpose of these admonitions is to combat what the Court saw as "inherently compelling pressures" at work on the person and to provide him with an awareness of the Fifth Amendment privilege and the consequences of forgoing it, which is the prerequisite for "an intelligent decision as to its exercise."

> *The considerations calling for the accused to be warned prior to custodial interrogation apply with no less force to the pretrial psychiatric examination at issue here.* Respondent was in custody at the Dallas County Jail when the examination was ordered and when it was conducted. That respondent was questioned by a psychiatrist designated by the trial court to conduct a neutral competency examination, rather than by a police officer, government informant, or prosecuting attorney, is immaterial. *When Dr. Grigson went beyond simply reporting to the court on the issue of competency and testified for the prosecution* at the penalty phase on a crucial issue of respondent's future dangerousness, *his role changed and became essentially like that of an agent of the State recounting unwarned statements made in the post-arrest custodial setting*. During the psychiatric evaluation, respondent assuredly was "faced with a phase of the adversary system" and was "not in the presence of [a] perso[n] acting solely in his interest." [Cite omitted]. Yet he was given no indication that the compulsory examination would be used to gather evidence necessary to decide whether, if convicted, he should be sentenced to death. He was not informed that accordingly, he had a constitutional right not to answer the questions put to him. *Estelle* v. *Smith*, *supra*, 101 S.Ct. at 1875.

This Court held that Smith's Fifth Amendment rights were violated by the admission of Dr. Grigson's testimony at the penalty phase. The same considerations compel that result here. Petitioner was in custody when the examination was conducted at the instance of the Juvenile Court. Petitioner was given no warnings that his responses could be used against him at trial. Even though Dr. Lange did not testify, his report was nonetheless used to discredit petitioner's claim of emotional disturbance. As in *Estelle*, there is no doubt that the Fifth Amendment is indeed implicated by the use of Dr. Lange's report because the jury heard evidence of statements made by petitioner to Dr. Lange,[69] and further, because Dr. Lange's clinical observations were obviously based upon other unreported statements by petitioner. The clear import of Dr. Lange's report is that he based his clinical opinion on the

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[69] For example, the jury heard evidence that "David states at times he has been very angry at certain people, staff at the center and thought about hurting them." [A 59].

testimonial content of what petitioner said. As in *Estelle* v. *Smith*, there is no evidence that the psychiatrist's diagnosis had been founded only upon petitioner's "mannerisms, facial expressions, attention span or speech patterns. . . ." *Estelle* v. *Smith*, 101 S.Ct. at 1873, fn. 8. As this Court stated, citing the Amicus Brief of the American Psychiatric Association in *Estelle*, "absent a defendant's willingness to cooperate as to the verbal *content* of his communications, . . . a psychiatric examination in these circumstances would be meaningless." *Id.* Simply put, a psychiatric evaluation based upon a clinical interview is readily distinguishable from non-testimonial evidence such as voice exemplars, handwriting exemplars, line-ups, blood samples or fingerprints.

Further, this Court concluded in *Estelle* v. *Smith* that petitioner therein had a Sixth Amendment right to the assistance of counsel before he submitted to the psychiatric examination. This Court stated:

> Here, respondent's Sixth Amendment right to counsel clearly had attached when Dr. Grigson examined him at the Dallas County Jail, and their interview proved to be a "critical stage" of the aggregate proceedings against respondent. [Cite omitted]. Defense counsel, however, were not notified in advance that the psychiatric examination would encompass the issue of their client's future dangerousness, and respondent was denied the assistance of his attorneys in making the significant decision of whether to submit to the examination and to what end the psychiatrist's findings could be employed." *Estelle* v. *Smith*, *supra*, 451 U.S. at 470-471.

Notably, this Court did not find that Smith had the right to have counsel actually present at the competency evaluation. Rather, the crux of the holding was that Smith had a Sixth Amendment right to *consult* with counsel prior to the evaluation, and further, to make an intelligent decision as to whether or not to participate in the examination, based upon counsel's advice as to any use to which the state *might* put the results of the examination. The same holds true for petitioner herein. The Juvenile Court ordered the evaluation in question. There was never any notice to counsel that the state would use the results of that evaluation to prejudice a material aspect of

petitioner's defense. This was precisely the concern of this Court in *Estelle* in finding a violation of Smith's Sixth Amendment right to counsel:

> As the Court of Appeals observed, the decision to be made regarding the proposed psychiatric evaluation is "literally a life or death matter" and is "difficult . . . even for an attorney" because it requires "a knowledge of what other evidence is available, of the particular psychiatrist's bias and predilections, [and] of possible alternative strategies at the sentencing hearing." [Cite omitted]. It follows logically from our precedents that a defendant should not be forced to resolve such an important issued without "the guiding hand of counsel." *Estelle* v. *Smith*, *supra*, 451 U.S. 471.

In analyzing the applicability of the principles enunciated in *Estelle* v. *Smith*, this Court should distinguish the circumstances of petitioner's trial from those instances in which other courts (and this Court in dicta in *Estelle*)[70] have indicated that a criminal defendant waives his constitutional rights by introducing defense evidence of insanity. For example, the Eleventh Circuit Court of Appeals has held that "the introduction by the defense of psychiatric testimony constituted a waiver of the defendant's fifth amendment privilege in the same manner as would the defendant's election to testify at trial." *Booker* v. *Wainwright*, 703 F.2d 1251 (CA11, 1983), citing *Battie* v. *Estelle*, 655 F.2d 692, 702 (CA5, 1981). However, the facts of petitioner's case are clearly distinguishable from the facts of either *Booker* or *Battie*. For example, in *Booker*, the defendant had filed a notice of insanity defense, and also had requested a psychiatric evaluation in order to determine his *sanity* at the time of the offense. Accordingly, when Booker testified during the sentencing proceedings that he had no recollection of the day of the crime, the Eleventh Circuit found that the prosecutor acted properly in impeaching his testimony with information Booker gave to the psychiatrist during the evaluation.

Unlike the situation in *Booker*, however, petitioner never testified at his trial. Therefore, the state should not have been

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[70] *Estelle* v. *Smith*, 101 S.Ct. at 1874.

allowed to use Dr. Lange's report as "impeachment," even though the report may have contradicted the reports put into evidence by petitioner. It must be remembered that at the time of petitioner's early evaluations, he was not facing any pending criminal charges. He had been previously adjudicated delinquent and committed to a state facility for *treatment*. Accordingly, he had no fifth amendment privilege to "waive."

The Fifth Circuit in *Battie* v. *Estelle*, *supra*, has also stated that "the introduction by the defense of psychiatric testimony constituted a waiver of the defendant's fifth amendment privilege in the same manner as would the defendant's election to testify at trial." *Battie* v. *Estelle*, 655 F.2d at 701-702. The Court further stated, noting agreement by "virtually every other federal and state court addressing this issue," that this result "is justified by the State's overwhelming difficulty in responding to the defense psychiatric testimony without its own psychiatric examination of the accused and by the need to prevent fraudulent mental defenses." *Id.* at 702. Neither of the justifications relied upon by the Fifth Circuit and other federal courts are present in petitioner's case. In the first place, the evidence presented by petitioner in fact was the State's "own psychiatric examination of the accused," dating from petitioner's commitment as a juvenile. The reports were not "defense" psychiatric evaluations. Further, it would be absurd to assert in petitioner's case that the State had any interest in preventing "fraudulent mental defenses," in that petitioner was relying upon evidence which was in existence long before the offense was ever committed. Consequently, assuming *arguendo* that there may in some circumstances be an implied waiver of the fifth amendment privilege by the introduction of psychiatric evidence, no such "waiver" can be found to exist by the type of evidence introduced by petitioner at his trial.

Because the introduction of evidence from petitioner's competency evaluation by Dr. Lange was introduced against him at trial, and further, because neither petitioner nor his counsel were advised that his responses would be used against him, the introduction of such evidence violated both the Fifth and Sixth Amendments. Accordingly, petitioner respectfully requests this court to reverse his conviction and to grant him a new trial.

CONCLUSION

For all the reasons stated, petitioner respectfully requests that the decision of the Kentucky Supreme Court in his case be reversed.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1986

DAVID BUCHANAN, - - - - Petitioner

versus

COMMONWEALTH OF KENTUCKY, - Respondent

On Writ of Certiorari to the Supreme Court of Kentucky

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED

I.

In a joint trial for capital murder, where the death penalty is sought against one defendant but not the other, does the state by death-qualifying the jury deprive the latter defendant of an impartial jury, representative of a fair cross-section of the community?

II.

Where the defendant himself obtains a psychiatric examination in an attempt to obtain involuntary commitment, is it constitutionally permissible for the state to introduce findings from that examination for the sole purpose of rebutting other psychological evidence presented by the defendant to establish a mental status defense?

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1986

No. 85-5348

DAVID BUCHANAN, - - - - *Petitioner*

v.

COMMONWEALTH OF KENTUCKY, - *Respondent*

On Writ of Certiorari to the Supreme Court of Kentucky

BRIEF FOR RESPONDENT

OPINION BELOW

The opinion below is reported as *Buchanan* v. *Commonwealth*, Ky., 691 S. W. 2d 210 (1985). On direct appeal of conviction, the Kentucky Supreme Court affirmed Petitioner's life sentence and terms of years for the sodomy, rape, robbery, and murder of a Louisville gas station employee named Barbel Poore.

The court below rejected Petitioner's contention that the exclusion of persons unwilling to comply with the oath of juror, by considering imposition of the death penalty in a capital case, results in a jury more likely to convict than it otherwise would have been. Petitioner's argument that the exclusion of such persons renders the jury unrepresentative of the community was likewise rejected. The court held that in a

joint trial where capital punishment is sought against one defendant but not the other, impanelling a "death qualified" jury does not deprive either defendant of an impartial jury representative of a fair cross-section of the community. Thus the court's ruling applies equally to a defendant for whom the death penalty is sought, and one such as Petitioner who is properly joined with him for trial[1] but does not face capital punishment.

In addition, the court below found that Petitioner's privilege against self-incrimination was not violated by the introduction of a post-arrest mental status report, offered in rebuttal of three other such reports made prior to the crimes at issue. The court held that the three reports introduced by Petitioner were not evidence of extreme emotional disturbance, a statutory mitigating factor which was his sole theory of defense. The court further held that any possible error would have been non-prejudicial because the report introduced in rebuttal was actually cumulative, and harmless because Petitioner had waived his rights in a prior confession and the other evidence of his guilt was overwhelming.

JURISDICTION

United States Supreme Court Rules 15.1(a) and 21.1(a) in pertinent part state:

> The statement of a question presented will be deemed to comprise every subsidiary question

[1]Petitioner conceded that joinder with his co-defendant was proper by failing to question this either at trial or on appeal.

> fairly included therein. Only the question set forth in the jurisdictional statement or fairly included therein will be considered by the Court.

The Court generally has declined to address claims presented for the first time on certiorari review, or those beyond the legitimate scope of the question for which review was granted. *See: e.g., Murray* v. *Carrier*, —— U. S. ——, 106 S. Ct. 2639 (1986); *Smith* v. *Murray*, —— U. S. ——, 106 S. Ct. 2661 (1986); *Hill* v. *California*, 401 U. S. 797, 805-806 (1971); *Cardinale* v. *Louisiana*, 394 U. S. 437, 438-439 (1969); *Lawn* v. *United States*, 355 U. S. 339, 362, n.16 (1958); *Lear, Inc.* v. *Adkins*, 395 U. S. 653, 675 (1969). *Compare: Batson* v. *Kentucky*, —— U. S. ——, 106 S. Ct. 1712 (1986).

In his brief to this Court, Petitioner attempts to raise constitutional claims which were not presented in his petition for writ of certiorari, nor in his appeal below to the Kentucky Supreme Court. Only after certiorari was granted has Petitioner attempted to invoke Equal Protection[2] and Freedom of Expression with respect to the issue concerning "death qualification" of his jury.

In his appeal to the Kentucky Supreme Court, Petitioner confined his constitutional claims to Due Process and the Sixth Amendment's fair cross-section requirement:

[2]One of Petitioner's pre-trial motions recited Equal Protection as a reason to preclude death-qualification in "capital cases," but he abandoned that claim on direct appeal. (JA 6)

> "Appellant's trial by a death-qualified jury, where he did not face the sanction of capital punishment, violated due process of law by effectively impanelling a conviction-prone jury, and further, denied appellant due process by excluding a jury chosen from a fair cross-section of the community."

Not once did his brief even mention Equal Protection or Freedom of Expression. Accordingly, the Kentucky Supreme Court limited its review to only those claims presented for its consideration.

In his petition for writ of certiorari, Petitioner likewise asserted that Due Process and the Sixth Amendment's fair cross-section requirement were the only constitutional provisions involved here. Thus with respect to the death-qualification of the jury, his question presented for review was:

> "Whether petitioner's trial by a death qualified jury where he did not face the sanction of capital punishment, violated due process of law by effectively impanelling a conviction-prone jury, and further, denied petitioner due process and his sixth amendment rights by excluding a jury chosen from a fair cross-section of the community?"

Only after certiorari was granted on this issue did Petitioner seek to expand the scope of his argument to include Equal Protection and Freedom of Expression claims, as well as a challenge to the prosecutor's use of peremptory strikes, none of which are properly before the Court. In short, the question Petitioner now attempts to present is not the one for which certiorari was granted:

> "Did the federal constitution permit the state to eliminate, by peremptory and cause challenge, 20% of the qualified venire based on religious or political views on capital punishment when the state did not seek the death penalty against petitioner at a joint capital/non-capital trial?"

In the text of his brief Petitioner strays even farther afield, claiming that the very means by which the jury was death-qualified amounts to constitutional error in and of itself. This he does in sub-part (J) of his argument, entitled "Unconstitutional Death-Qualification Under Witherspoon/Adams/Witt," at pages 46-51 of the brief.

Until now, the particular persons whose exclusion Petitioner complained about were only those individuals unwilling to comply with the oath of juror by considering imposition of the death penalty in a capital case. In his brief on writ of certiorari, however, Petitioner further challenges the peremptory exclusion of even those jurors whose opposition to capital punishment does not prevent them from considering the death penalty, and thus are qualified to serve. Petitioner ventures outside of the record in his complaint about the alleged exclusion of Democrats who, he contends, are more lenient than Republicans. Nothing in the record divulges the jurors' political party affiliation. The voter registration books relied upon at page 41 of Petitioner's brief are not part of the record in this case. Nor are any of the various newspaper articles he cites. *See: Lawn* v. *United States, supra,* at 364.

Most illustrative of all is the conclusion of Petitioner's argument, wherein he entreats the Court to choose from this veritable shopping list of unpreserved constitutional claims. At page 51 of his brief, Petitioner asserts that whatever "constitutional handle one attaches to the problem" is unimportant because "David Buchanan was prejudiced."

Therefore, Respondent respectfully submits that the Court lacks jurisdiction to consider the various grounds which are extraneous to the question presented in the petition. In observance of the Court's procedural rules on the matter, the brief for Respondent is confined to a discussion of only those claims for which certiorari has been granted, *i.e.*, Due Process and the fair cross-section requirement of the Sixth Amendment.

Respondent does not challenge jurisdiction with respect to the "*Estelle* v. *Smith*" issue.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution in pertinent part states:

> No person . . . shall be compelled in any criminal case to be a witness against himself.

The Sixth Amendment to the United States Constitution in pertinent part states:

> In all criminal prosecutions the accused shall enjoy the right to a . . . trial, by an impartial jury . . . and to have the assistance of counsel for his defence.

The Fourteenth Amendment to the United States Constitution in pertinent part states:

> (N)or shall any State deprive any person of . . . liberty . . . without due process of law. . . .

COUNTERSTATEMENT OF THE CASE

Respondent does not accept Petitioner's statement of the case, and urges the Court to adopt the following account of the material facts.

The victim in this case, twenty year old Barbel Poore, was an employee of the Cheker gas station on Cane Run Road in Louisville, Kentucky. (TE 399, 942, 947) She and her parents were acquainted with Petitioner's co-defendant, Kevin Stanford, having conversed with him on several occasions. (TE 519) Stanford lived in the apartment complex adjoining the Cheker station. (TE 407-408, 475)

Troy Johnson was a mutual friend of both Stanford and Petitioner. (TE 1029, 1047) On January 7, 1981 Petitioner approached Johnson with a plan to rob the Cheker station. (TE 1029-1030) Petitioner explained that it would be easy because the victim would be there all by herself. (TE 1031) After assuring Johnson that the victim would not be harmed, Petitioner asked him for a gun to use in the robbery. *(Id.)* Johnson borrowed a handgun belonging to his brother and loaned it to Petitioner, who then had him procure some ammunition for the gun. *(Id.)*

Petitioner then telephoned Stanford in regard to the plan. (TE 1032-1033) Later that afternoon, John-

son drove Petitioner to Stanford's apartment complex. *(Id.)* Upon meeting with Stanford, Petitioner instructed Johnson to wait for them in the car. (TE 1033-1034) Stanford remarked that the victim might recognize his clothing. *(Id.)*

Johnson waited inside his car for approximately thirty minutes, when Petitioner returned with a two-gallon can of gas and placed it inside the car. (TE 1034-1035, 1053) Petitioner instructed Johnson to continue waiting, and then returned to the Cheker station for another fifteen minutes. *(Id.)*

Barbel Poore was robbed, raped, orally sodomized, and anally sodomized during this period of time. (TE 364-365, 372, 398, 405, 485-486, 946, 1044) Petitioner would later confess that he:

> . . . went into the restroom and [Stanford] was having intercourse with the service station attendant and they were standing up. He said that the clothes were off of the service station attendant from the mid section down, but that she did have her top on. He stated that he and [Stanford] then put the service station attendant on the floor and they each took turns raping and sodomizing the service station attendant on the floor of the restroom. (TE 485)

Petitioner eventually returned to Johnson's car a second time and instructed him to follow Stanford, who was driving the victim in her own car. (TE 1035-1037) After both cars arrived at a secluded area on Shanks Lane in Louisville, Petitioner got out and walked over to the victim's car where Stanford was

standing. *(Id.)* After Stanford shot her the first time, Petitioner began walking away as the second shot was fired. A motorist, who happened by the area in time to hear the gunshots, observed that the apparent gunman was "tagging behind" the other subject on their way back to the getaway car. (TE 954-955, 957, 963)

Later that evening, Petitioner boasted to Johnson about what he had done to the victim at the Cheker station. (TE 1044) In addition to the fact that he raped and then sodomized her, Petitioner described the victim's plea for him to end the sexual attack, which he refused. *(Id.)* Petitioner and Johnson watched a television newscast concerning the murder. (TE 1045) Petitioner explained that the newscast was inaccurate about the position in which the victim's corpse was left. *(Id.)* He told of how the first gunshot, the one to her face, caused the victim to begin falling over in the back seat of the car before the insurance gunshot was fired into the back of her head. (TE 1046)

Also later that evening, the victim's mother and a fellow employee named Jesse Ortagia stopped at the Cheker station on their way home from work. (TE 931-932) Mr. Ortagia noticed that the lights and the gas pumps were still turned on, even though the station should have been closed for at least three hours by then. (TE 399-400, 933) When Mr. Ortagia saw that the inside of the station had been ransacked, he telephoned the police. (TE 934)

The victim's car was located soon after the police investigation began:

> She had her pants, blue jeans and panties down around her ankles, her buttocks were exposed up in the air. • • • • • She was kneeling on the floorboards of the car and her face was on the seat in the rear of the car. (TE 401)

At trial, Petitioner's lawyer conceded that he had committed the robbery. (TE 1205, 1207, 1246-1247, 1289) In addition, expert forensic testimony established that one of the several foreign hairs found on the victim's buttocks belonged to Petitioner. (TE 578, 585, 645, 794, 805)

Although his confession to the police was introduced into evidence, Petitioner did not take the witness stand. (TE 482-486)

Petitioner's sole defense witness was one of his former social workers, Martha Elam. (TE 1115) On direct examination, she testified from a series of mental status reports concerning Petitioner's mental capacity, emotional status, and attitude toward his prior criminal offenses. (JA 39-53) Such testimony established that Petitioner:

(i) had a full scale intelligence quotient of 74,
(ii) on several occasions had been charged with felonies ranging from theft to robbery,
(iii) suffered poor impulse control,
(iv) had the "potential for developing a full-blown schizophrenic disorder",
(v) was "paranoid", and

(vi) "could be expected to be dangerous with respect to acts against other persons."

The foregoing mental status reports had been made several months prior to the crimes at issue here. (JA 40, 44-45)

During cross-examination of this witness, the prosecutor was permitted over Petitioner's objection to rebut such evidence by having her recite excerpts from a mental status evaluation report made several months after the subject crimes were committed. (JA 55-59) In pertinent part, the report noted the following observations:

> He was neither especially hostile nor friendly, mainly tolerant and cooperative. The discussion focused on the hear (sic) and now since goal was to ascertain meeting of the 202A criteria or not. He was in good reality contact and reasonable knowledge of current events outside the center and seemed to be functioning in full normal I.Q. range. Short and long term memory appeared intact. There was not evidence of hallucinations or delusions. [Affect] was generally shallow without imporia or disporia. He seemed somewhat optimistic about the outcome of the charges pending against him. No suicidal obviation is present, although, David states at times he has been very angry at certain people, staff at the center and thought about hurting them. David was not especially anxious or restless except initially and

seemed overall relaxed. And it's signed by Robert Ryan[3], M.D. (JA 58-59)

The jury found petitioner guilty of robbery, rape, sodomy, and murder. (JA 76-77) Petitioner's life sentence for murder was ordered to be served concurrently with consecutive twenty year prison terms for each of the other crimes. (JA 78) Stanford, a juvenile the same as Petitioner, was tried in the same proceeding and received identical prison sentences for the sodomy and robbery, as well as a five year term for a related charge of receiving stolen property. (TR 81CR1218, 18-21, 28-31) Following a bifurcated penalty proceeding for Stanford's murder conviction, he was sentenced to death. (TE 1542; TR 82CR0406, 314) The juvenile court did not waive jurisdiction over Johnson, however, who had done little more than drive the getaway car. (TE 1048-1050) As a result, he was never eligible for trial as an adult felon. *(Id.)*

SUMMARY OF ARGUMENT

I.

In capital prosecutions, the State has a legitimate interest in impanelling only those jurors who are willing to comply with their oath by considering the death penalty as a possible sentencing option. Death-qualifying the jury ensures that those who serve will decide

[3]This appears to be a typographical error on the part of the court stenographer, since according to the report itself the examiner was Robert Lange, M.D. (JA 72-73) The opinion below refers to him as "Dr. Ryan." *Buchanan* v. *Commonwealth*, Ky., 691 S. W. 2d 210, 213 (1985).

guilt and punishment according to the law and facts of the case.

The State has an equally important interest in having a single jury decide the guilt and punishment of all the participants in the crime. Joinder of defendants for trial necessarily affords the jury a greater perspective than it would have had in a separate trial. As a result, the jury is better equipped to compare the defendants' relative degrees of culpability in the same crime. This promotes reliability in the jury's findings, and avoids inconsistent results.

Both of the foregoing interests are at stake in cases where, as here, not all of the participants in a capital offense are eligible for the death penalty. Both of these interests are served by permitting the State to death-qualify the jury in joint trials of capital and non-capital defendants. The impartiality of a death-qualified jury is not lessened by the additional consideration of a non-capital co-defendant in the crime.

Such a procedure does not deprive the non-capital co-defendant of any specific right guaranteed by the Constitution. Joinder of defendants for trial, even if improper, is not a constitutional violation in and of itself. Deprivation of a specific right must be shown to have occurred, which Petitioner is unable to do. Neither does death-qualifying the jury in a capital proceeding, in and of itself, result in a specific constitutional violation.

Petitioner has never questioned the appropriateness of being tried together with his capital co-defendant.

Instead, his argument has been directed at the fairness of death-qualifying juries in capital cases generally. He complains that the process excluded jurors for a reason unrelated to his case. But because his case was part of the *whole* case before the jury, which involved a co-defendant who did face the death penalty, Respondent submits it was enough that the jurors were excluded for reasons relating to their ability to decide the *case*.

The Sixth Amendment's fair cross-section requirement applies to jury venires, not petit juries themselves. Even if it did apply to petit juries, Petitioner would have to show that opponents of capital punishment make up a distinct or recognizable group, which he cannot do. Groups defined only by shared attitudes are not cognizable as a class for purposes of fair cross-section analysis.

The procedure employed here did not offend Fourteenth Amendment Due Process, but resulted in a constitutionally impartial jury. Petitioner does not allege that any of the jurors impanelled in his case were specifically biased. He instead relies exclusively upon social science studies and opinion polls which would impute juror bias. The Constitution does not assume juror bias. Rather, it presupposes impartiality on the part of all jurors who express their willingness to decide the particular case according to the law and evidence. Petitioner has no constitutional right to impanel partisan jurors.

The rule urged by Petitioner would have widespread application, affecting all prosecutions involving multiple defendants or multiple charges, even in purely non-capital contexts. It would needlessly generate additional litigation in all instances where a juror is subject to exclusion for cause related to one, but not all aspects of the particular case. Respondent submits that logically if the jury is impartial with respect to the capital defendant, it is no less impartial as to his non-capital co-defendant.

II.

In Kentucky, a defendant is guilty of murder when 1) the defendant intends to cause the death of another person, and 2) he causes the death of that person or another. However, a finding of murder may be reduced to first degree manslaughter if the jury finds that the defendant acted under the influence of "extreme emotional disturbance." The defendant bears the burden of production and the risk of non-persuasion on this mitigating circumstance of "extreme emotional disturbance." To raise the issue, the defendant must show 1) that he was provoked by some event, and 2) that his response to this provocation was reasonable under the circumstances as he believed them to be. Evidence of mental illness may assist the jury in assessing the reasonableness of the defendant's response, but does not, by itself, constitute extreme emotional disturbance. Where evidence of mental illness is presented, without evidence of the triggering element of

provocation, the defendant has simply put on some proof of insanity. If the defendant has failed to specifically plead insanity or if the jury is not convinced that he was insane when he committed the offense, such evidence of mental illness simply presents a "failed" insanity defense. In the present case, Buchanan presented a "failed" insanity defense by introducing the reports of three psychologists, who had examined him prior to the commission of these offenses.

This Court indicated in *Estelle* v. *Smith*, 451 U. S. 454 (1981), that a defendant who initiates a psychiatric evaluation or attempts to introduce psychiatric evidence may be compelled by the state to respond to a psychiatrist. Furthermore, a majority of the federal circuits have affirmatively held that a defendant may be compelled to submit to a psychiatric examination, without violating his privilege against self-incrimination, where the defendant has raised the insanity defense or has introduced psychiatric evidence to support such a defense. *See United States* v. *Byers*, 740 F. 2d 1104 (D.C. Cir. 1984) (Scalia, J.). The central thread running through these decisions is the recognition that, under these circumstances, the defendant's silence may deprive the state of the only effective means it has of controverting the defendant's proof on an issue that he interjected into the case. The federal courts have also consistently recognized that the only effective rebuttal of psychiatric opinion testimony is contradictory opinion testimony. Although these decisions speak specifically of the insanity defense, the

underlying considerations apply with equal force to the defense of extreme emotional disturbance. Under each of these mental status defenses, the defendant may, in effect, "testify" through his experts. Such a defendant should not be allowed to use the Fifth Amendment as a shield to distort the truth. Where a mental status defense is asserted, the state must be given the opportunity to effectively test such evidence, in order to preserve judicial integrity and to assist juries in their truth-finding function.

Buchanan's primary defense, throughout this prosecution, was that, if he had any involvement in the killing of Barbel Poore, he could only be guilty of manslaughter because he acted under the influence of extreme emotional disturbance. Prior to trial, defense counsel moved the court to order a "202A examination," by a psychiatrist, to determine whether Buchanan was mentally ill and a danger to himself or others. At trial, Buchanan's sole witness was his social worker. Through her testimony, Buchanan introduced the results of three psychological examinations, which he had undergone prior to the crime. During this testimony, the jury was informed five times that Buchanan was "emotionally disturbed." Because Buchanan introduced psychological evidence in support of his mental status defense, the prosecutor could have compelled him to submit to a psychiatric examination, without violating his privilege against self-incrimination. Instead, the prosecutor chose a less intrusive procedure to rebut this evidence. Through cross-examination of

the social worker, the prosecutor introduced the psychiatrist's findings, based upon the 202A examination. There was no violation of the Fifth Amendment.

Buchanan cannot fairly argue that he was not afforded his Sixth Amendment right to consult with counsel prior to the 202A examination. Defense counsel requested the examination. Therefore, there is every reason to believe that defense counsel consulted with him prior to making the request.

If the Court should decide that the introduction of this psychiatric opinion evidence violated Buchanan's rights under the Fifth or Sixth Amendment, such a finding would only affect his murder conviction. In any event, such error should be deemed harmless beyond a reasonable doubt, based upon the overwhelming evidence of Buchanan's guilt.

One of his confederates detailed Buchanan's planning of and participation in the crimes. A forensic scientist testified that hairs found on the victim's body matched head and pubic hair standards taken from Buchanan. Most importantly, the jury was informed that Buchanan had admitted his participation in the robbery and sexual offenses, to the police. Buchanan had also described the killing to police and admitted being present when Stanford killed Barbel Poore. Based upon this overwhelming evidence of guilt, the Court should conclude that any error, if error did occur, was harmless beyond a reasonable doubt.

ARGUMENT

I.

Where the Accused Is Properly Joined for Trial With a Co-defendant Eligible for More Severe Punishment, Sentence-Qualification of the Jury Does Not Deprive Either Defendant of an Impartial Jury, Representative of a Fair Cross-section of the Community.

Constitutional claims identical to the ones presented here, involving jury impartiality and representiveness in the context of a capital trial, were considered and rejected by this Court in *Lockhart* v. *McCree*, ___ U. S. ___, 106 S. Ct. 1758 (1986). Petitioner challenges the for-cause exclusion of the same category of potential jurors, those who are unwilling to comply with the oath of juror by considering imposition of the death penalty in a capital case, as that challenged in *McCree*. He argues, the same as was done in *McCree*, that such persons make up a recognizable and distinctive group without whom the jury is not representative of the community. Similarly, Petitioner contends that the exclusion of such individuals results in a jury statistically more likely to convict than it otherwise would have been. And like the defendant in *McCree*, Petitioner asserts that for these reasons, "death qualification" of the jurors violates his Fourteenth Amendment Due Process and Sixth Amendment rights to an impartial jury representative of a fair cross-section of the community.

The only difference between *McCree* and the instant case is that here Petitioner did not risk capital punish-

ment himself, but instead was properly joined for trial with a co-defendant who did face the death penalty.

Petitioner can no more prove jury partiality in the present case than did the respondent in *McCree*. Logically, if the jury is "impartial" as to the defendant who is on trial for his very life, then it follows that the same jury is impartial with respect to his non-capital co-defendant as well. Joinder of the latter defendant in such a case does not perforce affect the jury's impartiality. This would appear to hold true whether joinder of defendants, in and of itself, is proper or not.

Petitioner was properly joined for trial with his co-defendant, Kevin Stanford. Both were juveniles, and they had been indicted for the same crimes, sodomy, robbery, and capital murder, against the same victim. In addition, Petitioner had been indicted for the rape of this victim, while Stanford had been indicted for a related charge of receiving stolen property. (TR 81CR1218, 18-21, 28-31)

Section 9.12 of the Kentucky Rules of Criminal Procedure, (RCr) entitled Consolidation of Offenses For Trial, stated:

> The court may order two (2) or more indictments or informations or both to be tried together if the offenses, and the defendants, if more than one (1), could have been joined in a single indictment or information. The procedure shall be the same as if the prosecution were under such single indictment or information.

RCr 6.18, entitled Joinder Of Offenses, stated:

> Two (2) or more offenses may be charged in the same information or two (2) or more offenses whether felonies or misdemeanors, or both, may be charged in the same indictment in a separate count for each offense, if the offenses are of the same or similar character or are based on the same acts or transactions connected together or constituting parts of a common scheme or plan.

RCr 6.20, entitled Joinder Of Defendants, stated:

> Two (2) or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

Under Kentucky law, a criminal defendant who feels that such joinder will be unduly prejudicial must file a motion for severance pursuant to RCr 9.16 and make a pre-trial showing of how joinder would be unfair. *Commonwealth* v. *Rogers,* Ky., 698 S. W. 2d 839 (1985). The trial judge is vested with wide discretion in making this determination. *Wilson* v. *Commonwealth,* Ky., 695 S. W. 2d 854 (1985).

By failing to request severance at trial, or assign the matter as error on appeal to the Kentucky Supreme Court, Petitioner has conceded that joinder was proper in this case.[4] Consequently, as far as his complaint

[4]Stanford requested severance on his own behalf, but the showing he had to make was different than what would have been re-

(Footnote Continued on Next Page)

about the fairness of death qualifying the jury is concerned, Petitioner stands in the same shoes as his capital co-defendant.

He appears to have preferred it that way, at least for purposes of trial. It is inconceivable that Petitioner's failure to request severance of defendants was an oversight. Petitioner had already confessed, and the other evidence of his guilt was so overwhelming that the robbery charge went uncontested. (TE 482-485, 1205, 1207, 1246-1247, 1289) All the evidence would point to Stanford as the triggerman, but the extent of Petitioner's involvement in the events leading up to the actual shooting was equally impressive. Petitioner had planned the robbery; he enlisted the assistance of Stanford and Johnson; Petitioner timed the robbery so that the victim would be closing up and alone; he had the same motive as Stanford for permanently silencing the victim; Petitioner not only procured the weapon used to kill the victim, but insisted that ammunition be supplied for the gun; Petitioner directed Johnson to follow Stanford from the robbery scene to the murder scene. *Buchanan* v. *Commonwealth,* Ky., 689 S. W. 2d 210, 211-212 (1985). Although the evidence would show that Stanford was the actual trig-

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(Footnote Continued From Preceding Page)

quired of Petitioner. (TR 81CR1218, 198-200; 3/1/82 PTH 184-186) The trial judge's *sua sponte* ruling that an objection by one defendant is an objection by both was made sometime after the denial of Stanford's severance motion, and appeared to apply only to matters of jury selection. (JA 28)

german in the murder,[5] the significance of this distinction could have been lost on the jury in his absence from Petitioner's trial. Thus, Petitioner seems to have made a conscious and deliberate decision to not request separate trials.

The extra measure of perspective necessarily afforded the jury in a joint trial, especially where the defendants' degree of participation is relatively high, serves to further the truth finding process. Allowing the jury to see the entire picture increases the reliability of its factual findings, and having the same jury sentence the defendants tends to ensure against disparate punishment.[6] This is why Petitioner had no objection to his joinder with Stanford, who himself could not have fared any better in a separate trial. The government, as well as the defendants, had a legitimate interest in having the same jury decide the cases together for these very reasons.

In *United States* v. *Lane,* —— U. S. ——, 106 S. Ct. 725, 730, n.8, (1986), it was observed that:

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[5]Petitioner was aware of this prior to the trial. It was the very reason he gave in his pre-trial motion to preclude death as a possible punishment against him, citing *Enmund* v. *Florida,* 458 U.S. 782 (1982). (JA 19-23) Under recent interpretations of *Enmund,* the prosecutor's concession on this point appears to have been a windfall for Petitioner. *E.g., Ross* v. *Kemp,* 756 F. 2d 1483 (11th Cir. 1985). In his brief, Buchanan gives the impression that shortly after his conviction the Kentucky Legislature abolished the death penalty with respect to juvenile offenders. This is incorrect. See Ky. Rev. Stat. 635.125.

[6]Inconsistent results are precisely what the legal system is designed to avoid, and they can only undermine public confidence in such a system.

> Improper joinder does not, in itself, violate the Constitution. Rather, misjoinder would rise to the level of a constitutional violation only if it results in prejudice so great as to deny a defendant his Fifth Amendment right to a fair trial.

Thus, a specific constitutional violation must be shown to have resulted from the joinder of defendants, which cannot be done under the circumstances of this case. In *Shaffer* v. *United States,* 362 U. S. 511 (1960), the Court found no constitutional error in a case where the conspiracy charge, which had formed the sole basis for joinder of defendants, was dismissed during the trial. As the Court will see hereinbelow, Petitioner cannot demonstrate that any specific constitutional violation was occasioned by the death qualification of his jury.

FAIR CROSS-SECTION

In *McCree, supra,* the Court reaffirmed its long-standing position that the Sixth Amendment's fair cross-section requirement does not apply to the petit jury, but instead to the venire:

> We have never invoked the fair cross-section principle to invalidate the use of either for-cause or peremptory challenges to prospective jurors, or to require petit juries, as opposed to jury panels or venires, to reflect the composition of the community at large. See *Duren* v. *Missouri,* 439 U. S. 357, 363-364, 99 S. Ct. 664, 668 (1979); *Taylor* v. *Louisiana,* 419 U. S. 522, 538, 95 S. Ct. 692, 701-702 (1975). "[W]e impose no requirement that petit juries

> actually chosen must mirror the community and reflect the various distinctive groups in the population"; *cf. Batson* v. *Kentucky,* —— U. S. ——, n.4, 106 S. Ct. 1712, 1716, n.4, (1986) (expressly declining to address "fair cross-section" challenge to discriminatory use of peremptory challenges).
>
> * * * * * * *
>
> We remain convinced that an extension of the fair cross-section requirement to petit juries would be unworkable and unsound, and we decline McCree's invitation to adopt such an extension. 106 S. Ct. 1758, 1764-1765.

In *McCree,* the Court further found that even if *arguendo* the fair cross-section requirement applied to petit juries, there still would be no constitutional violation in this instance. In order to establish that a fair cross-section violation has occurred, the defendant must show that a "distinctive group" was systematically excluded. *Duren, supra,* 439 U. S. 357, 364. This he cannot do:

> In our view, groups defined solely in terms of shared attitudes that would prevent or substantially impair members of the group from performing one of their duties as jurors, such as the "*Witherspoon*-excludables" at issue here, are not "distinctive groups" for fair cross-section purposes. *McCree, supra,* 106 S. Ct. 1758, 1765.

DUE PROCESS FAIRNESS

The Court in *McCree* held that the impartiality of a jury is determined by the willingness of the individual jurors to comply with the judge's instructions and

apply the law to the facts of the case. Impartiality in the constitutional sense does not require that any particular blend of attitudes or viewpoints be represented on the jury, but only that such predispositions give way to the law. 106 S. Ct. 1758, 1767. Thus, a juror who harbors a particular attitude but yields to the law in that regard is considered impartial. *Irvin* v. *Dowd,* 366 U. S. 717, 723 (1961). It is this willingness to fairly decide the case, in spite of one's own preconceived ideas rather than because of them, that determines his impartiality. *Wainwright* v. *Witt,* 469 U. S. ——, 105 S. Ct. 844, 852 (1985); *Smith* v. *Phillips,* 455 U. S. 209, 217 (1982). In *McCree, supra,* the Court rejected as "illogical and hopelessly impractical" the suggestion that jury impartiality requires a certain mixture of attitudes to be present among the jurors, heedless of their ability to follow the law. 106 S. Ct. 1758, 1767. A given juror's impartiality is not affected by the for-cause exclusion of other jurors.

Because the Constitution "presupposes" the impartiality of a juror who is willing to comply with the law of a particular case, the scientific studies and opinion polls relied upon by McCree, and by Petitioner here,[7] are really beside the point. 106 S. Ct. 1758, 1770. In determining whether a petit jury has been impermissibly slanted in one way or another, the only concern of

[7]The only evidence Petitioner offered for consideration by the Kentucky Supreme Court in this regard was H. Zeisel, Some Data On Juror Attitudes Toward Capital Punishment (University of Chicago Monograph 1968) (Zeisel) (TR 270-325), which had been rejected in *Witherspoon* v. *Illinois,* 391 U. S. 510, 517-518 (1968), and was again rejected in *McCree, supra,* 106 S. Ct. 1758, 1763.

the Due Process Clause is with the expressed willingness of its members to fairly decide the particular case at hand. The supposed likelihood that a properly qualified juror will vote in a certain way does not matter, for "no defendant has the right to seat biased jurors whom he feels might be more sympathetic to his case." *Apodaca* v. *Oregon,* 406 U. S. 404, 413 (1972).

Petitioner cannot escape the reality that if the jury was constitutionally fair and impartial for purposes of resolving all the issues of guilt and punishment presented by co-defendant Stanford's case, as indeed it was according to *McCree, supra,* then it was likewise qualified to decide all the issues of guilt and punishment involved in Petitioner's case. Murder was not the only charge they shared. There were also the robbery and sodomy charges common to them. With regard to all three of these charges, the issues in Petitioner's case were eclipsed only by the additional consideration of the death penalty for Stanford's participation in the murder.

The fallacy of Petitioner's reasoning is further illustrated by considering the charge against Stanford for receiving stolen property which, although it stemmed from the other crimes here, is not an "aggravating circumstance" under Kentucky's death penalty statute, Ky. Rev. Stat. § 532.025. Thus, receiving stolen property was not an indispensible element of the capital case against Stanford. It would seem beyond cavil that the consolidation of this charge with the others against Stanford had no effect on the jury's fairness and impartiality, but that is precisely what Petitioner argues.

Under his approach, the same jury in the same case would be constitutionally impartial for purposes of the capital murder charge but impermissibly partial with respect to the charge for receiving stolen property, which brings to mind the Orwellian concept of "double-thinking." The *per se* rule that Petitioner urges would require reversal of Stanford's conviction on the lesser charge because "*Witherspoon*-excludables" were disqualified from service on the petit jury for a reason unrelated to their ability to decide that particular accusation. What he overlooks is the fact that they were excluded for a reason related to the *case*.

Adoption of such a rule would adversely affect the administration of criminal justice by either requiring the severance of capital and non-capital charges in all cases, or depriving States of their legitimate interest in death qualifying the jury in those instances where capital and non-capital offenses against the same defendant are consolidated for trial. One option would needlessly generate additional litigation in an already congested criminal justice system, while the other would effectively frustrate the State's legitimate capital sentencing scheme. Neither alternative is desirable.

The approach taken by Petitioner would also require severance of capital and non-capital defendants because, as in the above illustration, "*Witherspoon*-excludables" are disqualified from participation in the particular case for reasons "unrelated" to their ability to decide the fate of the non-capital offender.

Such a *per se* rule would have widespread application beyond the capital/non-capital setting as well, requiring severance in all cases where a juror is subject to excusal for cause relating to one defendant but not the other, or one charge but not the other. Such cause could be that the juror is specifically biased for or against one defendant, but not the other. The co-defendant's complaint would be the same: that the juror is excused for reasons unrelated to his ability to decide the fate of that co-defendant.

STATE INTERESTS

Here, as in all capital trials, the State has a significant interest in impanelling jurors who can "follow their instructions and obey their oaths" and who "will consider and decide the facts impartially and conscientiously apply the law as charged by the court," *Wainwright,* 469 U. S. —, 105 S. Ct. 844 (1985), quoting *Adams* v. *Texas,* 448 U. S. 38, 44-45, (1980). Such jurors are not uniquely an interest of the State; the "impartial jury" guaranteed to a defendant consists of just such jurors. *Witt,* 105 S. Ct. at 852.

More than that, the State has a legitimate interest in having the same jury decide the guilt and punishment of all of the participants in a crime together. Joinder of defendants for trial by the same jury invests the fact-finder with an extra degree of perspective on the whole case which it otherwise would not have had. The jury's factual determinations are more reliable because of this. It is the one way whereby the State may assure itself that one defendant's criminal

responsibility is fairly compared with that of the other. This promotes consistent results in jury sentencing, which in turn fosters public confidence in the legal system. These considerations underlie the States' joinder rules in the same way as their federal counterpart, Fed. R. Crim. P. 8(b).

> Unquestionably, joint trials are more economical and minimize the burden on witnesses, prosecutors, and courts. They also avoid delays in bringing those accused of crime to trial. This much the Court concedes. It is also worth saying that separate trials are apt to have varying consequences for legally indistinguishable defendants. The unfairness of this is confirmed by the common prosecutorial experience of seeing codefendants who are tried separately strenuously jockeying for position with regard to who should be the first to be tried. *Bruton* v. *United States,* 391 U. S. 123 (1968) (Justice White, Dissenting).

These interests would not be served, but frustrated, by impanelling simultaneous juries. The results in that situation are as likely to be inconsistent or desparate as where the defendants are tried separately.

Petitioner's concern that in other cases, the government might death-qualify the jury only to withdraw its request for the death penalty upon receiving a conviction, overlooks two inescapable realities. First, the State cannot try *all* murder cases as capital offenses; the right to so proceed depends upon the presence of statutory "aggravating" factors. *E.g.,* Ky. Rev. Stat. § 532.025. It must be a "capital case" to begin with.

Second, having secured a conviction, the State is not then *required* to seek the death penalty. It may well be that in light of the evidence as it actually developed at trial, the prosecutor would feel that the death penalty should not be imposed. For that matter, the trial judge or the victim's family might feel that the death penalty would be inappropriate in view of the evidence adduced during trial. States should be free to withdraw requests for the death penalty without explanation, and without risking the loss of an otherwise valid conviction.

II.

Where the Defendant Himself Obtains a Psychiatric Examination in an Attempt to Obtain Involuntary Commitment, It Is Constitutionally Permissible for the State to Introduce Results From That Examination for the Sole Purpose of Rebutting Other Psychological Evidence Presented by the Defendant to Establish a Mental Status Defense.

A.

In Kentucky, a Criminal Defendant Bears the Burden of Production and Risk of Non-persuasion in Showing the Jury That His Possible Conviction for Murder Should be Mitigated to a Conviction for First Degree Manslaughter Because the Defendant Was Acting Under the Influence of "Extreme Emotional Disturbance."

The major premise of Buchanan's second argument is his claim that, in Kentucky, the *absence* of extreme emotional disturbance is an essential element of the offense of murder, on which the prosecution bears the burden of proof beyond a reasonable doubt. Buchanan's premise is fatally flawed.

To convict a person of murder in Kentucky in 1982, the prosecution was required to prove two elements: (1) "intent to cause the death of another person;" and (2) "caus[ing] the death of such person or of a third person." Ky. Rev. Stat. § 507.020(1)(a).[8] Kentucky also recognized the crime of first degree manslaughter. A person was guilty of manslaughter in the first degree if he intentionally killed another person "under circumstances which do not constitute murder because he acts under the influence of extreme emotional disturbance."[9]

Prior to the statutory enactment of the penal code in Kentucky, the offense of murder was reduced to voluntary manslaughter where the jury found that the killing was committed, without previous malice, in a

[8]Section 507.020(1) provides in relevant part: "A person is guilty of murder when: (a) with intent to cause the death of another person, he causes the death of such person or of a third person; except that in any prosecution a person shall not be guilty under this subsection if he acted under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse, the reasonableness of which is to be determined from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believed them to be. However, nothing contained in this section shall constitute a defense to a prosecution for or preclude a conviction of manslaughter in the first degree or any other crime."

[9]Ky. Rev. Stat. §507.030(1) provides in relevant part:

> A person is guilty of manslaughter in the first degree when: . . . (b) with intent to cause the death of another person, he causes the death of such person or of a third person under circumstances which do not constitute murder because he acts under the influence of extreme emotional disturbance, as defined in subsection (1)(a) of Ky. Rev. Stat. 507.020.

sudden heat and passion or in a sudden affray upon provocation ordinarily calculated to excite the passions beyond control. *Rice* v. *Commonwealth,* Ky., 472 S. W. 2d 512 (1971). However, the killing of a human being with a deadly weapon raised an inference of malice and the state was not required to negate the possibility that there were circumstances reducing the homicide below that of murder or excusing it altogether. *Partin* v. *Commonwealth,* Ky., 445 S. W. 2d 433 (1969); *Pittman* v. *Commonwealth,* Ky., 242 S. W. 2d 875 (1951). The Kentucky courts noted that requiring the defendant to produce evidence in mitigation was reasonable in light of the common sense proposition that such killings did not ordinarily happen by accident. *Partin,* 445 S. W. 2d, at 435-436.

In 1975, this Court announced its decision in *Mullaney* v. *Wilbur,* 421 U. S. 684 (1975), ruling that the Maine murder statute was unconstitutional because it placed the burden of proof on the defendant to show that the murder charge should be mitigated because he acted in "sudden heat and passion." Shortly thereafter, the defense bar endeavored to obtain rulings from the Kentucky Supreme Court which would construe Kentucky's common law treatment of murder in such a way that Kentucky's murder provision would be rendered unconstitutional under *Mullaney.* On July 1, 1977, the Kentucky Supreme Court rendered decisions in *Brown* v. *Commonwealth,* Ky., 555 S. W. 2d 252 (1977) and *Burch* v. *Commonwealth,* Ky., 555 S. W. 2d 954 (1977) declining the public defender's

invitation to bring Kentucky's murder scheme within the purview of *Mullaney*. *See, Burch,* 555 S. W. 2d at 958.

In *Brown,* the Kentucky court held that the state bore the burden of proof in a murder prosecution, including the burden to negate "defenses" raised by the defendant. Such "defenses" included evidence suggesting that a defendant is guilty of a lesser offense. 555 S. W. 2d, at 257. However, the court noted that *Mullaney* did not require the state to produce evidence negating every fact and circumstance that could serve either to reduce the degree of or to raise an absolute defense to the crime charged. Accordingly, the court allocated the burden of production on such "defenses" to the defendant. *Id.* Furthermore, the court ruled that the state was not required to come forward with countervailing proof unless the evidence tending to support the defense was of such probative force that the defendant would otherwise be entitled to a directed verdict of acquittal. 555 S. W. 2d, at 257, 258, n.6. Respondent would submit that, under this ruling, the defendant also bore the risk of non-persuasion.[10]

One year later, the Kentucky Supreme Court was faced with a similar *"Mullaney"* attack on the recently enacted murder and manslaughter statutes. In *Bartrug* v. *Commonwealth,* Ky., 568 S. W. 2d 925 (1978), the court rejected the defendant's attempt to invali-

[10]In *Patterson* v. *New York,* 432 U. S. 197 (1977), this Court approved a similar allocation of burdens to the defendant where he raises an affirmative defense to the charge of murder.

date the statutory scheme, abandoned its ruling in *Brown,* and conclusively held that the *absence* of "extreme emotional disturbance" was an essential element of the offense of murder, which must be proven by the state beyond a reasonable doubt. *Bartrug,* 568 S. W. 2d, at 926.[11] That holding was reiterated in *Edmonds* v. *Commonwealth,* Ky., 586 S. W. 2d 24 (1979).

Bartrug and *Edmonds* were both implicitly overruled in *Gall* v. *Commonwealth,* Ky., 607 S. W. 2d 97 (1980) — two years prior to Buchanan's trial. In *Gall,* the Kentucky Supreme Court took its first opportunity to examine the statutory concept of "extreme emotional disturbance" in detail. The court concluded that this statutory concept was the common law concept of "sudden heat and passion," but with two significant changes. *First,* the initial element, provocation, was expanded to include any event, even words. *Second,* a subjective element was interjected into the remaining element — the reasonableness of the defendant's response to the provocation would be viewed from his viewpoint under the circumstances as he perceived them to be.

Following this analysis of the concept itself, the *Gall* court concluded that "extreme emotional disturbance" was a "defense," as that term was defined in *Brown, supra,* because it served to reduce murder to manslaughter. The *Gall* court also returned to its earlier

[11]This is not the first time that the Kentucky Supreme Court has gone too far in attempting to comply with decisions of this Court. *See, e.g., Kentucky* v. *Whorton,* 441 U. S. 786 (1979).

holding in *Brown* in allocating the burdens on this issue. Recognizing that the state retained the ultimate burden of proof in a murder prosecution, the court ruled that the defendant bears the burden of production and the risk of non-persuasion on the "defense" of "extreme emotional disturbance." The court indicated that allocating these burdens to the defendant was vital to the effective enforcement of Kentucky's murder statute; otherwise, it would never be possible to convict a defendant of murder if there were no eyewitnesses and he testified that he was acting under the influence of extreme emotional disturbance.[12] *Gall,* 607 S. W. 2d, at 109.

Of equal importance was the court's finding that Gall had failed in his proof on the issue of extreme emotional disturbance. Gall had presented clinical evidence that he was suffering from paranoid schizophrenia, which was characterized as "an extreme emotional disturbance." Such evidence would assist the jury in assessing the reasonableness of Gall's response, upon a showing of provocation. However, Gall failed to establish provocation — there were no eyewitnesses to the killing and Gall chose not to testify. Without proof of provocation, Gall's clinical evidence simply presented an insufficient or failed insanity defense.

Finally, in *Wellman* v. *Commonwealth,* Ky. 694 S. W. 2d 696 (1985), the court relied on *Gall, supra,*

[12]In *Patterson, supra,* this Court recognized that this was a valid state interest. Therefore, the state may require that the defendant establish this mitigating circumstance with reasonable certainty. 432 U. S., at 207-210.

in rejecting a defendant's claim that his murder conviction should be set aside because there was no evidence of the absence of extreme emotional disturbance. The court noted that the decision in *Gall* implicitly overruled the only two cases which held that the *absence* of extreme emotional disturbance was an element of the crime of murder. In construing the import of the *Gall* decision, the court noted that mental illness may be considered by the jury in assessing the reaction by a particular defendant when there is probative, tangible and independent evidence of initiating circumstances (*i.e.,* provocation). Mental illness, by itself, does not constitute extreme emotional disturbance. *Wellman,* at 697-698.

Several principles of Kentucky law are evident from the foregoing discussion. At the time of Buchanan's trial, the prosecution was not required to prove the absence of extreme emotional disturbance as an element of the offense of murder. The mitigation issue of extreme emotional disturbance was a "defense," on which Buchanan bore the burden of production and the risk of non-persuasion. To establish this "defense," Buchanan was required to establish 1) he was provoked into an emotional disturbance, and 2) that his reaction to this provocation was reasonable, from his viewpoint under the circumstances as he believed them to be. Clinical evidence of a mental illness/disorder would support a finding that his reaction was reasonable from his viewpoint. However, without evidence of initiating circumstances, such clinical evi-

dence would simply constitute a failed insanity defense. Finally, the prosecutor was not required to produce negating evidence to sustain its ultimate burden of proof unless the defendant's evidence of extreme emotional disturbance was of such probative force that he would be entitled as a matter of law to an acquittal on the charge of murder. However, the prosecutor would be permitted to present evidence rebutting clinical testimony, to prevent confusion in the minds of the jurors.

B.

Where the Defendant Has Obtained a Psychiatric Evaluation in the Hopes of Being Involuntarily Committed, the State Does Not Violate His Privilege Against Self-incrimination by Introducing Findings From That Examination to Rebut Other Expert Evidence Offered by the Defendant in Support of His Mental Status Defense.

Buchanan grounds his Fifth Amendment claim squarely upon the Court's decision in *Estelle* v. *Smith,* 451 U. S. 454 (1981). Respondent will show that Buchanan's reliance upon *Estelle* is misplaced.

Faced with unique factual circumstances, the Court announced a limited holding in *Estelle:*

> A criminal defendant, who neither initiates a psychiatric evaluation nor attempts to introduce any psychiatric evidence, may not be compelled to respond to a psychiatrist if his statements can be used against him at a capital sentencing proceeding. 451 U. S., at 468.

Stated in the converse, the *Estelle* holding provides that a criminal defendant, who initiates a psychiatric evaluation or attempts to introduce psychiatric evidence, *may* be compelled to respond to a psychiatrist. The reason for the rule is obvious. "When a defendant asserts the insanity defense and introduces supporting psychiatric testimony, his silence may deprive the state of the only effective means it has of controverting his proof on an issue that he interjected into the case." *Estelle,* 451 U. S., at 465.

Nearly all of the federal circuits have rejected Fifth Amendment claims similar to that advanced by Buchanan. *See, United States* v. *Byers,* 740 F. 2d 1104, 1111 (D.C. Cir. 1984) (en banc) (Scalia, J.) and the cases cited therein. The *Byers* plurality noted that the other circuits had grounded their holdings upon policy grounds that had been variously described as the need to maintain a "fair state-individual balance," a matter of "fundamental fairness," and a function of "judicial common sense." *Id.* The *Byers* plurality chose to base their holding on the policy ground advanced by the Eighth Circuit in *Pope* v. *United States:*[13]

> It would be a strange situation, indeed, if, first, the government is to be compelled to afford the defense ample psychiatric service and evidence at government expense and, second, the govern-

[13] 372 F. 2d 710, 720 (8th Cir. 1967) (en banc) *vacated and remanded on other grounds,* 392 U. S. 651 (1968), *cert. denied* 401 U. S. 949 (1971).

> ment is to have the burden of proof, . . . and yet it is denied the opportunity to have its own corresponding and verifying examination, a step which perhaps is the most trustworthy means of attempting to meet that burden." *Byers,* 740 F. 2d., at 1113.[14]

The court also noted that the necessary balance in the criminal process can not be satisfied by merely allowing the state to cross-examine the defendant's expert witnesses. "Ordinarily, the only effective rebuttal of psychiatric opinion testimony is contradictory opinion testimony." *Byers,* 740 F. 2d at 1114. Finally, the plurality reasoned that this fair and practical limitation on the privilege against self-incrimination was supported by a long line of decisions by this Court holding that a defendant may not take the stand in his own behalf and then refuse to consent to cross-examination, citing *Fitzpatrick* v. *United States,* 178 U. S. 304 (1900). Based upon these considerations, the plurality joined the majority of other circuits in holding that a defendant, who raises the insanity defense, may constitutionally be subjected to a compulsory psychiatric examination and, when he introduces psychiatric testimony to support his defense, the court-appointed psychiatrists may also testify concerning that issue. *Byers,* 740 F. 2d at 1115.

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[14]Based upon all of the considerations underlying the plurality's holding, Respondent must assume that the holding would also apply to those defendants who asserted the insanity defense through the testimony of privately-employed psychiatrists, and in those cases where the defendant bore the burden of proof on insanity. *See, e.g.,* Ky. Rev. Stat. §§ 500.070(3) and 504.020(3).

Although *Estelle* and *Byers* focus on the insanity defense, Respondent would argue that the considerations underlying these decisions also apply to other "mental status" defenses, *i.e.,* extreme emotional disturbance, diminished capacity, *et cetera.* In all cases where the defendant asserts one of these "mental status" defenses, the "best evidence" concerning the defense rests peculiarly within the possession of the defendant. Where the defendant raises a "mental status" defense and presents psychiatric testimony in support of that defense, the state must be allowed to test that evidence. Such a procedure is essential to the integrity of the judicial process and serves to assist juries in their determination of the truth.[15] Therefore, Respondent would submit that the principles of *Estelle* and *Byers* apply to this case, where Buchanan asserted the "mental status" defense of extreme emotional disturbance and presented psychological testimony in support of that defense.

From the beginning of this case until the Kentucky Supreme Court announced its decision, Buchanan's consistent theme was that he could not be guilty of

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[15]The Court should also note that these defendants may, in effect, "testify" through their expert witnesses, without subjecting themselves to cross-examination or impeachment. *Battie* v. *Estelle,* 655 F. 2d 692 (5th Cir. 1981). Such defendants should not be allowed to use the Fifth Amendment privilege as a shield to distort the truth. *See, e.g., Oregon* v. *Hass,* 420 U. S. 714 (1975); *Harris* v. *New York,* 401 U. S. 222 (1971); *United States* v. *Castenada,* 555 F. 2d 605 (7th Cir. 1977).

murder because he acted under the influence of extreme emotional disturbance.[16]

On or about August 11, 1981 while Buchanan was still before the Jefferson County Juvenile Court, his present attorney entered into a joint motion to have Buchanan examined, by a psychiatrist, to determine whether Buchanan should be involuntarily committed

[16]Had the prosecutor not chosen, prior to trial, to forego death as a possible penalty in petitioner's case, there is every reason to believe that Buchanan would have also relied upon this defense as a statutory mitigating circumstance during the capital sentencing proceeding.

In Kentucky, the statutory mitigating circumstances have been enumerated in Kentucky Revised Statutes § 532.025(2)(b). Subsection 532.025(2)(b)(2) provides, "The capital offense was committed while the defendant was under the influence of extreme mental or emotional disturbance even though the influence of extreme mental or emotional disturbance is not sufficient to constitute a defense to the crime."

A similar provision has been included in the death penalty statutes of twenty-one other states: Ala. Code § 13A-5-21(2) (1975); Ark. Stat. Ann. § 41-1304(1) (1977); Cal. Penal Code § 190.3(d) (Deering 1985); Fla. Stat. Ann. § 921.141 (b) (West 1985); Ill. Ann. Stat. Ch. 38, § 9-1(c)(2) (Smith-Hurd 1979); Ind. Code Ann. § 45-50-2-9 (c)(2) (Burns 1985); LA-Code Crim. Proc. Ann. art. 905.5(b) (West 1986 Supp.); Mass. Gen. Laws Ann. Ch. 279, § 54(b)(2) (West 1981); Miss. Code Ann. § 99-19-101 (6)(b) (1985 Supp.); Mo. Ann. Stat. § 565.012(3)(2) (Vernon 1979); Mont. Code Ann. § 46-18-304(2) (1985); Neb. Rev. Stat. § 200-035(2) (1985); N.J. Stat. Ann. § 2C: 11-3(5)(a) (West 1982); N.M. Stat. Ann. § 31-20A-6(4) (1978); N.C. Gen. Stat. § 15-A-2000 (f)(2) (1983); 42 Pa. Cons. Stat. Ann. § 9711 (e)(2) (Purdon 1982); SC Code Ann. § 16-3-20(C)(b)(2) (Law Co-op 1985); Utah Code Ann. § 76-3-207(1)(b) (1978); Va. Code § 19.2-264.4(b)(ii) (1983); Wash. Rev. Code Ann. § 10.95.070(2) (1980); Wyo. Stat. § 6-2-102(J) (ii) (1983).

under Ky. Rev. Stat. § 202A.026[17] (hereinafter "202A"). (Tape of August 19, 1981, District Court Hearing, hereinafter, "District Tape," Digital Reading 029) Petitioner was examined by Dr. Robert T. G. Lange on August 14, 1981. (JA 72-73) Although the primary focus of the examination was to determine whether Buchanan met the 202A criteria, Dr. Lange also chose to evaluate Petitioner's competency to stand trial. (JA 72-73) During the 202A hearing,[18] defense counsel unsuccessfully attempted to elicit Dr. Lange's opinion that Petitioner was mentally ill and dangerous.[19] By initiating this psychiatric evaluation, defense counsel was clearly attempting to obtain a preemptory determination that petitioner was mentally ill. Under *Estelle* and *Byers,* the prosecutor could have properly compelled Buchanan to undergo an independent psychiatric evaluation, without violating his privilege against self-incrimination.

During later pre-trial hearings, defense counsel indicated, on two separate occasions, that he intended to present a "mental status" defense. (Transcripts of November 20, 1981 hearing, at 11-16; and December 12, 1981 hearing, at 5-8, 11) On these occasions, counsel

[17]Section 202A.026 provides: No person shall be involuntarily hospitalized unless such person is a mentally ill person: (1) Who presents a danger or threat of danger to self, family or others as a result of the mental illness; (2) Who can reasonably benefit from treatment; and (3) For whom hospitalization is the least restrictive alternative mode of treatment presently available.

[18]Apparently, the prosecutor was provided with a copy of Dr. Lange's report, prior to or during this hearing.

[19]See Note 17, *supra.*

strongly urged the court to bar the prosecutor from seeing the results of any court-ordered evaluation, referring to *Estelle* during one discussion. (*Id.*)

During his opening statement at trial, counsel informed the jury that a psychologist had indicated that Buchanan required treatment for an emotional disturbance. (TE 350-352) The prosecution then proved the statutory elements of murder in its case-in-chief against both Buchanan and Stanford through various witnesses. For his defense, Petitioner called one witness—Martha Elam, his social worker. (TE 1114-1145)

Through Ms. Elam's testimony, Petitioner introduced clinical evidence based upon three (3) psychological evaluations conducted prior to the time of the charged offenses. The substance of these evaluations has been summarized in Respondent's Counterstatement of the Case. However, the Court should note that, during Ms. Elam's testimony, the jury was told on five separate occasions that Buchanan was *emotionally disturbed*. (TE 1119-1125, 1134). Although this evidence simply presented a failed insanity defense under *Gall*, rather than an emotional disturbance defense, it is not surprising that the prosecutor chose to present evidence to the jury in an attempt to rebut these characterizations.[20]

[20]Respondent would submit that, under *Estelle* and *Byers*, the prosecutor could have stopped the trial at this point and compelled Petitioner to submit to a psychiatric evaluation, without violating his privilege against self-incrimination. See, e.g., *State* v. *Fair*, Conn., 496 A. 2d 461 (1985) and *State* v. *Lovelace*, Conn., 469 A. 2d 391 (1983).

However, when the prosecutor began to question Ms. Elam about Dr. Lange's evaluation, Petitioner objected. (TE 1139) The trial court overruled the objection, noting that defense counsel couldn't "argue about his mental status at the time of the commitment of this offense and exclude evidence when he was evaluated with reference to that mental status." (TE 1140) The trial court also overruled Petitioner's objection that introduction of Dr. Lange's evaluation would violate *Estelle*. (TE 1141-1142) Ms. Elam was then allowed to read Dr. Lange's report, excepting that paragraph entitled "Impressions," into evidence. (TE 1142-1144; JA 72-73)

At the close of the evidence, Petitioner unsuccessfully moved for a directed verdict of acquittal on the murder charge, on the ground that he had carried his burden of production on the issue of extreme emotional disturbance. (TE 1155-1159) Although the court did not believe that Petitioner had proven any emotional disturbance, he granted Petitioner's request that the jury be instructed on first degree manslaughter. (TE 1191, 1259-1262) Finally, defense counsel addressed the issue of extreme emotional disturbance during closing argument. (TE 1302-1305)

Under the principles of *Estelle* and *Byers*, the prosecutor could have compelled Buchanan to submit to a psychiatric evaluation, without violating his privilege against self-incrimination. Such an examination would have been reconstructive in nature, focusing on Buchanan's activities at the time of the crime to determine whether he was emotionally disturbed at that

time. In this case, the prosecutor employed a less-intrusive procedure. He utilized evidence already within his possession, Dr. Lange's report, to rebut Buchanan's "mental status" defense. Where the prosecutor could have compelled him to submit to a psychiatric examination, without violating his Fifth Amendment privilege, Respondent believes that the procedure employed clearly did not violate Buchanan's privilege against self-incrimination.

Furthermore, the facts of this case are easily distinguished from the facts underlying the *Estelle* decision. Dr. Lange limited his examination to a neutral determination of Buchanan's "202A" eligibility and competency, unlike the examiner in *Estelle*. As noted by the Kentucky Supreme Court, Lange's report did *not* contain any inculpatory statements by Buchanan nor any accusatory observations by Dr. Lange. *Buchanan* v. *Commonwealth*, Ky., 691 S. W. 2d 210, 213 (1985). More importantly, the prosecutor did *not* use Dr. Lange's report to establish an element of the offense of murder, on which it had the burden of proof. The Fifth Amendment is not applicable in the circumstances of this case. *Estelle*, 451 U. S., at 461-466. Therefore, Dr. Lange was not required to advise Buchanan of his rights, in accordance with *Miranda* v. *Arizona*, 384 U. S. 436 (1966).

C.

The Fact That Defense Counsel Requested the 202A Examination Clearly Indicates That Buchanan Had an Opportunity to Consult With Counsel, Prior to the Examination.

Petitioner similarly grounds his Sixth Amendment claim on the Court's decision in *Estelle* v. *Smith, supra*. Respondent submits that there is no factual basis for this claim.

In the instant proceeding, the Court ordered the 202A evaluation *at the request of defense counsel*. It must be assumed that counsel conferred with Buchanan on the implications of undergoing such an examination, prior to making his motion. *See, e.g., Henderson* v. *Morgan*, 426 U. S. 637, 647 (1976). Buchanan's argument that there was never any notice to counsel that the state would use the results of the evaluation as rebuttal evidence is not persuasive. The trial court was not required to explain the implications of counsel's motion to him. Furthermore, counsel indicated that he was familiar with *Estelle* when he moved for further examination (Transcript of November 20, 1981 Hearing, at 13-16). Counsel should not be allowed to insist upon a psychiatric evaluation and then cry, "Foul!" when he does not obtain the desired diagnosis.

Buchanan's Sixth Amendment claim should be summarily rejected.

D.

If the Court Should Find That Buchanan's Murder Conviction Occurred After an Infringement of His Fifth or Sixth Amendment Rights, Such Error Was Rendered Harmless by the Overwhelming Evidence of His Guilt.

Respondent has shown that the procedure employed by the prosecutor did not violate Buchanan's Fifth Amendment privilege against self-incrimination or his Sixth Amendment right to counsel. However, if the Court should find some infringement of either of these rights, Respondent would submit that such a finding would only affect Buchanan's murder conviction. Although only arguably relevant to the murder conviction, the issue of extreme emotional disturbance had no bearing whatsoever on his convictions for robbery, rape, and sodomy. Respondent would further submit that, based upon the overwhelming evidence of Buchanan's guilt, any error in this case was harmless, beyond a reasonable doubt.

A federal constitutional error may be held harmless where the court is able to conclude that the error was harmless beyond a reasonable doubt. *Chapman* v. *California,* 386 U. S. 18, 24 (1967). The Court has applied this "harmless error" doctrine to errors found under both the Fifth and Sixth Amendments, *Moore* v. *Illinois,* 434 U. S. 220 (1977) and *Milton* v. *Wainwright,* 407 U. S. 371 (1972). The Court should also note that the Eleventh Circuit has applied the "harmless error" doctrine to a trial procedure which violated *Estelle* v. *Smith,* 451 U. S. 454 (1981). *See Cape* v. *Francis,* 741

F. 2d 1287 (11th Cir. 1984).[21] Based upon the overwhelming evidence of Buchanan's guilt and the lack of evidence of emotional disturbance, the Court should rule that the use of Dr. Lange's report, as rebuttal evidence, did not contribute to his conviction and was, therefore, harmless beyond a reasonable doubt.

Buchanan was convicted of First Degree Murder (under a complicity theory).[22] (TE 1529-1530, 1347-1348). The abundant evidence establishing Buchanan's guilt has been detailed in the Counterstatement of the Case. In considering whether any error, if such occurred, was harmless, the Court should recall that Buchanan admitted, to both Troy Johnson and to the police, that he was with Stanford when he killed Barbel Poore. (TE 484-486, 1029-1036). In addition, a forensic scientist concluded that hairs recovered from Ms. Poore's buttocks and the floorboard of her car matched head and pubic hair standards of David Buchanan. (TE 504-505, 805-806, 811)

In light of this overwhelming evidence of Buchanan's guilt, Respondent would submit that the use of Dr. Lange's report to rebut Buchanan's "mental status" defense, essentially a non-issue in this case, was harmless beyond a reasonable doubt. *Chapman* v. *Cali-*

[21] The factual circumstances underlying the finding of error in *Cape* are not present in this case.

[22] Ky. Rev. Stat. § 502.020(2)(a) provides, "When causing a particular result is an element of an offense, a person who acts with the kind of culpability with respect to the result that is sufficient for the commission of the offense is guilty of that offense when he aids, counsels, or attempts to aid another person in planning, or engaging in the conduct causing such result.

fornia, supra. Because Dr. Lange's report did not contribute to Buchanan's conviction, the decision of the Kentucky Supreme Court should be affirmed.

CONCLUSION

WHEREFORE, Respondent respectfully urges the Court to affirm the judgment below.

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CERTIFICATE OF SERVICE

I hereby certify that four copies of the Respondent's Brief have been served by mailing to Hon. C. Thomas Hectus, and Hon. R. Allen Button, Gittleman & Barber, 635 West Main Street, Suite 400, Louisville, Kentucky 40202, Counsel of Record; and Hon. Kevin M. McNally, and Hon. M. Gail Robinson, Assistant Public Advocates, 151 Elkhorn Court, Frankfort, Kentucky 40601, Counsel of Record, this 29 day of September, 1986.

/s/ DAVID A. SMITH
Assistant Attorney General

No. 85-5348

IN THE
SUPREME COURT OF THE UNITED STATES

October Term

DAVID BUCHANAN,
Petitioner

versus

COMMONWEALTH OF KENTUCKY
Respondent

On Writ of Certiorari to the
Supreme Court of Kentucky

SUPPLEMENTAL BRIEF FOR RESPONDENT

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On Writ of Certiorari to the
Supreme Court of Kentucky

SUPPLEMENTAL BRIEF FOR RESPONDENT

PURPOSE

The purpose of this supplemental brief is to inform the Court that, since the filing of Respondent's brief, the parties have entered into a stipulation which resolves a previously disputed question of fact relevant to Petitioner's second argument.

DISCUSSION

For his Argument II, Petitioner alleges that his conviction was obtained in violation of the Fifth and Sixth Amendments to the United States Constitution. (Petitioner's Brief, at 39-50). These federal constitutional claims were grounded squarely upon this Court's decision in Estelle v. Smith, 451 U.S 454 (1981). Petitioner's claims were factually premised upon his assertion that the prosecutor's use of psychiatric findings, obtained during an examination to determine whether Petitioner qualified for involuuntary commitment under Ky.Rev.Stat. Ch. 202A, as rebuttal evidence violated Petitioner's Fifth and Sixth Amendment rights because Petitioner had not been informed that these findings could be used against him at trial. This rebuttal evidence was offered by the state to counter three (3) favorable psychological reports introduced by Petitioner. At three different places in his brief to this Court, Petitioner intimated that the trial

court ordered the "202A" examination on its own motion and without notice to Petitioner's counsel:

> Prior to waiver, the Juvenile Court, apparently on his own motion, 'requested' a 'mental status exam' of David by a psychiatrist. (Petitioner's brief, at 6).
>
> Petitioner was in custody when the examination was conducted at the instance of the Juvenile Court. Petitioner was given no warnings that his responses could be used against him at trial. (Id., at 47).
>
> The Juvenile Court ordered the evaluation in question. There was never any notice to counsel that the state would use the results of that evaluation to prejudice a material aspect of petitioner's defense (Id., at 48-49).

After Respondent's brief was filed, the parties entered into a stipulation, which was filed in the Kentucky Supreme Court on October 16, 1986. (Appendix to Respondent's Supplemental Brief). As the Court can see, Petitioner has stipulated that, on or about August 11, 1981, the Juvenile Court ordered a psychiatric examination of Petitioner, at the request of defense counsel C. Thomas Hectus.[1]

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1. Mr. Hectus has represented Petitioner since the inception of this prosecution.

In Estelle, supra, the Court held:

> A criminal defendant, who neither initiates a psychiatric evaluation nor attempts to introduce any psychiatric evidence, may not be compelled to respond to a psychiatrist if his statements can be used against him at a capital sentencing proceeding. (Emphasis added) 451 U.S. at 468.

Petitioner has conceded that he initiated the psychiatric evaluation by Dr. Lange. Therefore, the state could have properly compelled Petitioner to submit to examination by an independent psychiatrist. As noted in Respondent's original brief, the prosecutor in this case employed the less-intrusive procedure of introducing Dr. Lange's findings, which were made available to him during the "202A" examination. The Kentucky Supreme Court correctly concluded that there was no violation of the Fifth and Sixth Amendment.

CONCLUSION

WHEREFORE, Respondent respectfully urges the Court to affirm the Judgment below, based upon Petitioner's concession that he initiated the

psychiatric examination in question.

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CERTIFICATE OF SERVICE

I hereby certify that four copies of the Respondent's Supplemental Brief have been served by mailing to Hon. C. Thomas Hectus, and Hon. R. Allen Button, Gittleman & Barber, 635 West Main Street, Suite 400, Louisville, KY 40202, Counsel of Record; and Hon. Kevin M. McNally, and Hon. M. Gail Robinson, Assistant Public Advocates, 151 Elkhorn Court, Frankfort, KY 40601, Counsel of Record, this 18 day of November, 1986.

David A. Smith

Assistant Attorney General

A P P E N D I X

C. Scott
lerk

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CERTIFICATION

I, John C. Scott, Clerk of the Supreme Court of Kentucky, do hereby certify that the attached "Stipulation Concerning August 14, 1981 Psychiatric Examination of David Buchanan" is a true and correct copy as it appears on file in my office in the case of David Buchanan vs. Commonwealth of Kentucky, File No. 83-SC-58-MR, Jefferson Circuit Court No. 82-CR-0406.

The attached "Stipulation Concerning August 14, 1981 Psychiatric Examination of David Buchanan" was filed in the above-captioned case on October 16, 1986 and was not part of the record on appeal when considered by the Kentucky Supreme Court.

Done this 16th day of October, 1986, at Frankfort, Kentucky.

JOHN C. SCOTT, CLERK

BY: Betty Whitton
Betty Whitton
Chief Deputy Clerk

FILED

OCT 16 1986

John C. Scott
CLERK
SUPREME COURT

SUPREME COURT OF KENTUCKY
FILE NO. 83-SC-58-MR

DAVID BUCHANAN — APPELLANT

versus

STIPULATION CONCERNING AUGUST 14, 1981
PSYCHIATRIC EXAMINATION OF DAVID BUCHANAN

COMMONWEALTH OF KENTUCKY — APPELLEE

The parties hereto, David Buchanan and the Commonwealth of Kentucky, by counsel stipulate as follows:

1. On or about August 11, 1981, defense counsel C. Thomas Hectus moved the Jefferson District Court to order a psychiatric examination of David Buchanan for the purpose of determining whether or not he satisfied the "KRS 202A criteria." Jefferson District Judge Fitzgerald sustained that motion and entered an order accordingly.

2. Pursuant to that order, Psychiatrist Robert Lange examined David Buchanan on or about August 14, 1981.

3. Dr. Lange's August 17, 1981 report includes an opinion on the competency of David Buchanan to stand trial,

although no such opinion had been ordered or requested.

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NO. 85-5348

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

DAVID BUCHANAN, Petitioner,

v.

COMMONWEALTH OF KENTUCKY, Respondent.

On Writ Of Certiorari To The
Supreme Court of Kentucky

REPLY BRIEF FOR PETITIONER TO RESPONDENT'S BRIEF, RESPONDENT'S SUPPLEMENTAL BRIEF AND BRIEF OF AMICI CURIAE

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JURISDICTION

i) First Amendment and Equal Protection Clause

Respondent claims, as to argument I, that this Court "lacks jurisdiction to consider the various grounds which are extraneous to the question presented in the petition" [Respondent's Brief, RB 6]. Kentucky's objection appears to go more to Buchanan's choice of subheadings than anything else. Surely the equal protection aspects [subsection H, Buchanan's Brief, BB 33-34] and the interests of the excluded citizen/jurors [subsection G, BB 32-33] are important public policy considerations. Lockhart v. McCree, 106 S.Ct. 1758, 1766 (1986) and 106 S.Ct. at 1779 (dissent), say so. However, these arguments hardly change the basic nature of the claim before the Court.

"The statement of a question presented will be deemed to comprise every subsidiary

question fairly included therein... U.S.SUP.CT.RULE 21.1(a).[1] Admittedly, Buchanan's analysis of the many sides of this problem is deeper here than in the Kentucky Supreme Court. Hopefully, that is as it should be. Those aspects of "death-qualification" briefed here which respondent refuses to discuss are "fairly included" within Buchanan's consistent and full-fledged attack on the practice below.

This is hardly a situation where an appellant or petitioner raises an issue never discussed below.[2] The cases cited by appellee are

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[1]All emphasis added unless otherwise indicated.

[2]Respondent concedes that petitioner's theories (even equal protection) were presented to the trial judge [RB 3 n.2]. The Commonwealth does quibble over subheading "G" of petitioner's brief - focusing on the citizen/juror's right not to be excluded [BB 32]. Since this First Amendment
(footnote continued)

inapposite. See, e.g., Cardinale v. Louisiana, 394 U.S. 437, 439 (1969) ["In view of the failure to raise the issue he presents here in any way below..."]. In fact, Kentucky cites Lear, Inc. v.

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analysis is simply the flip-side of the Sixth Amendment "cross-section" argument and since Buchanan did complain at trial about capital trial jurors who are "arbitrarily single[d] out" [Joint Appendix, A 6], all of the points made here were argued in the trial court.

On appeal Kentucky stated: "Such persons [WE's]... have not been singled out...for special treatment" [Commonwealth's Brief below, CB 20]. Under Kentucky law the prosecution may preserve issues for review even if the defendant doesn't. Bruce v. Commonwealth, 581 S.W.2d 8, 9 (Ky. 1979) [the prosecutor's motion "fairly present(ed)" the issue]. This Court takes a similar position. Batson v. Kentucky, 106 S.Ct. 1712, 1716 n.4 (1986). Anyway, the Kentucky Supreme Court specifically rejected the claim that WE's have been "singled out...for special treatment." Buchanan v. Commonwealth, 691 S.W.2d 210, 212 (1985) [A 82].

Whether these various points are viewed as a First or Sixth Amendment analysis, a due process or equal protection claim, the essential points were made below - at trial and on appeal.

Adkins, 395 U.S. 653, 662 n.10 (1969), where respondent's essential argument was rejected:

> We clearly have jurisdiction to consider whether this decision is wrong. In doing so, we have the duty to consider the broader implications of Lear's contention, and vindicate, if appropriate, its claim to relief on somewhat different grounds than it chose to advance below...

This Court's "jurisdiction does not depend on citation to book and verse." Eddings v. Oklahoma, 455 U.S. 104, 113-14 n.9 (1982). See also Taylor v. Kentucky, 436 U.S. 478, 482 n.10 (1978), where an objection invoking "fundamental principles of judicial fair play" was deemed sufficient to alert the trial judge to a Fourteenth Amendment due process claim.[3]

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[3]Of course, the individual state's procedures must be considered in deciding what is adequate. The Kentucky Supreme Court had before it a trial record containing all the specific points made here in Buchanan's brief (i.e., equal protection...jurors being "singled out", specific objection to the manner of "death-qualification" in this case). This is sufficient considering Buchanan's per se attack on the practice on appeal. See Beck v. Alabama, 447 U.S. 625, 630-31

(footnote continued)

"Obviously there are instances in which 'the ultimate question for disposition'...will be the same despite variations in the legal theory...urged in its support..." Picard v. Connor, 404 U.S. 270, 277-78 (1971).

In any event, it is certain that the Kentucky Supreme Court considered and rejected each and every aspect of the problem briefed here. The opinion cites numerous "death-qualification" cases which discuss these theories, especially Hovey v. Superior Court, 616 P.2d 1301 (Cal. 1980). Buchanan v. Commonwalth, 691 S.W.2d 210, 212 (Ky. 1985) [A 81].

ii) "Death-Qualification" in this Case

Respondent also ignores Buchanan's complaint [subsection J, BB 35-39] that the particular "death-qualification" process employed in this case was itself unconstitutional...in

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n.6 (1980) where the issue in question was dropped from the final state appellate brief. This Court concluded that the petitioner "did present his federal claims in some fashion to the Alabama Supreme Court..." Indeed, under Kentucky law the Court may notice an error in the record and reverse on its own initiative. KY. RULE CRIM. PROC. 9.26. See, e.g., Johnson v. Commonwealth, 609 S.W.2d 360 (Ky. 1980).

four ways: 1) it focused only on the death penalty and not at all on relevant punishment options, 2) the potential jurors were generally not asked if they could lay aside personal feelings and follow the law, 3) a broader basis was used to exclude veniremen than permissible, and 4) the "process effects" were enhanced since petitioner did not face the death penalty.

Respondent again concedes that all of these points were specifically made before the trial judge who ruled that an automatic objection is registered for both defendant's when one counsel objects.[4] This is a legitimate procedure in Kentucky. Recently, in McQueen v. Commonwealth, ___ S.W.2d ___, ___ (Ky. 1986), the Kentucky Supreme Court reaffirmed this principle, approving the decision of a "trial court" allowing "any benefit arising from the pretrial motion of one party [to] inure equally to the other co-defendant."

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[4]Sometimes this was only Buchanan's lawyer [A 33].

On appeal, co-defendant Stanford[5] based his complaints on these four specific flaws in the "death-qualification" procedure used by the trial judge. These complaints are still pending before the Kentucky Supreme Court in Stanford's appeal. Thus, all of these sub-arguments are, and were, before the Kentucky Supreme Court. The trial judge's specific ruling, and Kentucky practice, permits Buchanan to rely on these complaints as raised in his co-appellant's brief.[6]

More to the point, Buchanan phrased the argument in the Kentucky Supreme Court **the only way he could.** Both the prosecutor and the trial judge stated that Buchanan was "not involved in...death-qualification" [A 28], implying he

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[5]See Stanford's brief at 9-11, 24-52 and Kentucky's response at 4-6, 16-26. Oral argument was held on August 29, 1986.

[6]The prosecutor, whose name appears on respondent's brief in this Court, specifically agreed to this procedure: "I think that would be proper..." [A 28].

therefore had no standing to object (although he did) to the exclusion of particular jurors or any need to be concerned with how the procedure was effectuated.

In Kentucky, and elsehwere, "objections to questions pertaining to the death penalty on voir dire...are mooted when the verdict is guilty and the sentence is life..." Van Cleave v. State, 598 S.W.2d 65, 69 (Ark. 1980). "Witherspoon...does not invalidate the guilty verdict." Woodards v. Cardwell, 430 F.2d 978 (6th Cir. 1970). Bumper v. North Carolina, 391 U.S. 543, 546 (1968). "Since no death sentence was imposed...the appellant lacks standing..." to complain about "death-qualificaton." Herman v. State, 396 So.2d 222, 228 (Fla.App. 1981). Accord, e.g., Brinks v. State, 217 So.2d 813, 815 (Ala. 1968); Clark v. Smith, 164 S.E.2d 790, 793 (Ga. 1968). This is true even where jurors are concededly excused in violation of Witherspoon and, as in Kentucky, where a new jury must be impaneled anyway to resentence the defendant. Meyer v. Commonwealth, 472 S.W.2d 479, 481-82 (Ky. 1971).

Thus, the only way Buchanan could frame his argument on appeal is to attack the use of

any death-qualification[7] in his case. This he did, and did well, below. Therefore, this Court has jurisdiction to entertain all of petitioner's complaints, both general and specific, regarding "death-qualification."

ARGUMENTS

I.

PURGING 20% OF THE JURY PANEL (7 FOR CAUSE, 4 BY PEREMPTORY) DUE TO RELIGIOUS OR POLITICAL VIEWS ON CAPITAL PUNISHMENT VIOLATES THE FIRST, SIXTH AND FOURTEENTH AMENDMENTS WHEN ONE DEFENDANT IN A JOINT TRIAL DOES NOT FACE THE DEATH PENALTY.

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[7]The point about peremptory challenges is not, as misinterpreted by respondent, some type of belated Batson complaint. The peremptories are relevant for the obvious reason that absent "death-qualification", the prosecutor couldn't have used his peremptories to exclude these people, at least because of their views on the death penalty. No independent claim is made here that in a capital case a prosecutor cannot use his peremptories as he sees fit, for non-racist reasons.

A. WHY MCCREE DOESN'T CONTROL

i) Impartiality on Sentence

Petitioner must repeat his essential claim. "Death-qualified juries" are more punitive. "[I]t is self-evident", Witherspoon v. Illinois, 391 U.S. 510, 518 (1968), yet Buchanan cites numerous studies confirming this tilt towards more harsh punishment of the criminal offender.[8] Respondent dismisses "the scientific studies" with a wave of the hand as "besides the point" [RB 26]. Perhaps, but respondent chooses to ignore the point altogether. Precisely as Witherspoon and Adams v. Texas, 448 U.S. 38 (1980) defined juror impartiality, so too Buchanan defines it. As McCree stated, "both

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[8] "Social scientists are sometimes accused of laboriously demonstrating the obvious." Zeisel, Some Data on Juror Attitudes Towards Capital Punishment at vii (University of Chicago Monograph) (1968), filed herein [TR 270].

Witherspoon and Adams dealt with the special context of capital sentencing, where the range of jury discretion..." is wide. Here, although not capital, the jury had unbridled sentencing discretion.[9] McCree distinguished Witherspoon and Adams because of a difference between guilt and punishment decisions. Thus, Witherspoon and Adams clearly control this case. Buchanan's jury was unconstitutionally "stacked" on punishment, at least[10]. Witherspoon, 391 U.S. at 523.

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[9]In Kentucky "[w]hen the jury returns a verdict of guilty it shall fix the degree of the offense and the penalty..." KY. RULE CRIM. PROC. 9.84(1).

[10]In his dissent in Witherspoon, 391 U.S. at 541 n.1, Justice White declined to "wholly foreclose the possibility of a showing that certain restrictions on jury membership imposed because of jury participation in penalty determination produce a jury which is not constitutionally constituted for purposes of determining guilt." Petitioner also submits this is such as a case.

ii) Balancing of Interests

Since Buchanan does not seek to topple a practice deemed essential to the administration of the death penalty, the balancing of interests here is quite different than in McCree. Few, if any, would see much in "death-qualification" to recommend it -- when viewed in isolation. Difficult, time consuming and expensive, "death-qualification" is the only time citizens are cross-examined about religious or political beliefs in an American courtroom. Absent a compelling justification, such as was central to McCree, the equation is not the same. This is a different case.

B. SOCIAL SCIENCE RESEARCH

In Witherspoon this Court, "required no empirical data or evidence to convince it of this tendency to impose...[more punitive sentences] or to prove that such a jury was unrepresentative

in...sentencing..." Grigsby v. Mabry, 483 F.Supp. 1372, 1379 (E.D.Ark. 1980), aff'd, 637 F.2d 525 (8th Cir. 1980), on remand, 569 F.Supp. 1273 (E.D.Ark. 1983), aff'd, 758 F.2d 226 (8th Cir. 1985), rev'd sub nom, Lockhart v. McCree, 106 S.Ct. 1758 (1986). On the other hand, Buchanan has gone to great lengths to demonstrate the obvious.[11] Buchanan has proved his case.

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[11]Other studies of general interest are: Garcia and Griffitt, Evaluation and Recall of Evidence: Authoritarianism and the Patty Hearst Case. 12 JOUR. RESEARCH PERSONALITY 57 (1978) [high authoritarians recalled more prosecution evidence than defense evidence]; Gleason & Harris, Race, Socio-economic Status and Perceived Similarity as Determinants of Judgments by Simulated Jurors, 6 JOUR. APPLIED SOC. PSYCHOLOGY 186 (1976) [death penalty attitudes have some predictive value in non-capital cases]; Epstein, Authoritarianism, Displaced Aggression, and Social Status of the Target, 2 JOUR. PERSONALITY SOC. PSYCHOLOGY 585 (1965) [authoritarianism and punitiveness]; Mills & Bohannon, Character Structure and Jury Behavior: Conceptual and Applied Implications, 28 J. PERSONALITY & SOC. PSYCHOLOGY 662-67 (1980) [authoritarianism and conviction proneness];

(footnote continued)

C. WITHERSPOON AND ADAMS SHOULD NOT BE OVERRULED.

In Witherspoon, 391 U.S. at 320-521, the jury selection procedure "crossed the line of neutrality" and produced "a jury uncommonly willing" to impose the maximum sentence. In finding a violation of the Due Process Clause of the Fourteenth Amendment, Witherspoon considered both the "fair cross-section" and "impartiality"

Mills & Bohannon, Juror Characteristics: To What Extent Are They Related to Jury Verdicts, 64 JUDICATURE 22-31 (1980) [authoritarianism and conviction proneness]; Moran & Comfort, Scientific Juror Selection: Sex as a Moderator of Demographic and Personality Predictors of Impaneled Felony Juror Behavior, 43 J. PERSONALITY & SOC. PSYCHOLOGY, 1052-63 (1982) [authoritarianism and conviction proneness]; Tyler & Weber, Support for the Death Penalty: Instrumental Response to Crime, or Symbolic Attitude?, 17 L. & SOC'Y REV. 21, 35 (1982) [authoritarianism and pro-death penalty views]; Werner, Kagehiro & Strube, Conviction Proneness and the Authoritarian Juror: Inability to Disregard Information or Attitudinal Bias?, 67 J. APPLIED PSYCHOLOGY 629 (1982) [authoritarianism and inadmissible evidence].

interests at stake. Witherspoon was reaffirmed in Adams.

The essence of Buchanan's argument [Subsection "D" of his brief, BB 25-26] was ignored by respondent and amici. Kentucky barely cites Witherspoon [RB 26 n.7] and Adams [RB 29] and declines to give them a deferential nod. Amici doesn't even go this far.

In essence, respondent and amici wish this Court to implicitly overrule Witherspoon and Adams. Buchanan, it is claimed, doesn't have a constitutional leg to stand on. "[S]ince no specific guarantee of the Bill of Rights[12] has

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[12]Amici's argument that Buchanan must point to a specific constitutional prohibition against the practice of "death-qualification" begs the question. It is unclear whether the practice was even used at the time the Federal Constitution was drafted. "It was never used in England, and it has not always been used in this country." Despite widespread use of the death penalty, "the
(footnote continued)

been violated, the Petitioner cannot contend that the Fourteenth Amendment imposes a bar..." [Brief of Amici Curiae, AB 12-13].

Respondent understandably relies upon McCree's statement that the "Sixth Amendment's fair cross-section requirement applies to jury venires, not petit juries themselves" [RB 14]. Assuming the Court is unwilling to reconsider

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first reported use of death-qualification was in 1820, United States v. Cornell, 25 F.Cas. 650 (C.C.D.R.I. 1820) (No. 14, 868), and after that the practice caught on only gradually." Ardia McCree's Brief for Respondent at 25. The earliest Kentucky case is Smith v. Commonwealth, 37 S.W. 586 (Ky. 1896), permitting elimination of jurors who could not convict of a capital offense -- a type of juror not in issue here. See Oberer, Does Disqualification of Jurors for Scruples Against Capital Punishment Constitute Denial of a Fair Trial on Issue of Guilt?, 39 TEX.L.REV. 545, 566-7 n.92 (1961).

this approach,[13] Buchanan still must prevail because the significant "fair cross-section" interests at stake can still be considered under the Due Process Clause of the Fourteenth Amendment.

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[13]Buchanan does not retreat from his claim that such a bright-line rule is unfair and unduly focuses on form rather than substance. In the Hall of Justice in Jefferson County, Kentucky, where this trial took place, the jury panel is dispatched from one large room to individual courtrooms. Is it reasonable to conclude that systematic exclusion is constitutional if it occurs in individual courtrooms but unconstitutional if it takes place down the hall in the main jury pool room?

In Meyer v. Commonwealth, 472 S.W.2d 479 (Ky. 1971), another Jefferson County capital case, veniremembers were excused before they reached the individual courtroom in question if they were "opposed" to capital punishment. Under respondent's fair cross-section analysis, (the problem of "distinctiveness" aside) did this constitute a potential Sixth Amendment violation? If so, how can the location of the room where the question was asked be the governing principle?

Second, the explicit guarantee of an "impartial jury" as found in the Sixth Amendment seems quite specific. Under the "totality of the circumstances", Buchanan has been denied due process of law.

D. STATE INTEREST

It is obvious that "death-qualification" need not occur in non-capital cases. Cf. Donaldson v. Sack, 265 So.2d 499 (Fla. 1972). This is what Buchanan seeks, nothing more. The cataclysmic scenarios painted by respondent and amici do not withstand scrutiny.

Neither respondent nor amici challenge petitioner's argument that a decision in his favor would result, at worst, in a separate trial for one non-capital co-defendant every few years in Kentucky [BB 26-27 n.43]. There is no reason to believe the situation is any different

elsewhere as the dearth of cases on point indicates.[14]

The state is free, of course, to not "death-qualify" the jury at a joint capital/non-capital trial or to employ one or another of the five options described in Buchanan's original brief -- a non-unanimous jury recommendation, a less-than-twelve member jury, simultaneous juries, a separate sentencing jury for the capital defendant or substitution of "death-qualified" alternates. Some of these options

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[14]If Buchanan's tendered distinction built around non-capital jury sentencing is deemed important, any decision could be limited to the handful of jury sentencing states: Arkansas, Kentucky, Missouri, Oklahoma, Tennessee, Texas and Virginia. III American Bar Association Standards for Criminal Justice: Sentencing Alternatives and Procedures, Sec. 18-1.1, Commentary at 20 n.16 (2nd Ed. 1980).

require little or no additional cost.[15] Some satisfy respondent's [RB 28] and amici's [AB 7] purported concern for "consistency"[16] very nicely.

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[15]In his dissent in Witherspoon, 391 U.S. at 542 n.2, Mr. Justice White stated:

> The States should be aware of the ease with which they can adjust to today's decision... replacing the requirement of unanimous jury verdicts with majority decisions about sentence should achieve roughly the same result reached by the Illinois Legislature through the procedure struck down today.

[16]Amici's claim that an adverse decision will cause prosecutor's to seek the death penalty "against...undeserving defendant[s]" hardly evidences a concern for "consistency" [AB 8].

At any rate, the "consistency" referred to is only a factor where the jury sentences and this interest would be better served if all non-capital homicide defendants were tried before neutral juries -- instead of everyone but Buchanan.

Respondent and amici ignore these suggested alternatives and rephrase the case as presenting only the issue of whether there is to be "an additional theory of constitutionally required severance" [AB 11]. If the states wish to choose the most costly remedy, they may. However, there is no need to do so. The choices are many -- and should be left to the states. Cf. Batson, 106 S.Ct. at 1724 n.24.

Amici's more hysterical warnings "...endless post-trial second guessing..." [AB 9] and respondent's hyperbolic "severance of capital and non-capital charges in all cases..." [RB 28] deserve little comment. The former concern can easily be remedied since no inquiry is needed in even arguable capital prosecutions. In most states, like Kentucky, such complaints are

already heard prior to trial anyway[17]. See, e.g., Smith v. Commonwealth, 634 S.W.2d 411 (Ky. 1982); State v. McCrary, 478 A.2d 339 (N.J. 1984). The latter fear is, with due respect, silly. It ignores the crucial nature of the state interest discussed in McCree - the right to seek the death penalty before a single jury.

E. ONE-SIDED, INADEQUATE "PUNISHMENT QUALIFICATION"

In his brief below, respondent argued that Buchanan failed to show that his jurors were unable "to consider the full range of punishment" [CB 6]. In fact, Buchanan was not permitted to do so. Continuing, respondent pointed out:

> In many instances an individual does not even realize his position on the matter unless and until he is summoned for jury service in a capital case, and

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[17]Contemporaneous objections are necessary and it is difficult to imagine a capital defendant objecting if the prosecutor decides to withdraw his request for the death penalty.

> often times remains uncertain... throughout the voir dire process [CB 6].

Restrictive, judge conducted "death-qualification" which only probes views on a punishment (death) irrelevant to the accused's case and not on relevant punishments (20 years to life) violates due process of law. This is true even assuming the exclusion meets the Witt/Witherspoon standard. Here there is no guarantee of that as the judge's uniform inquiry did little to unearth the shifting views respondent speaks of.

Apparently conceding the flawed nature of the "death-qualification" process in this trial, respondent claims this Court should ignore this fact because on appeal Buchanan mounted an attack on death-qualification itself - rather than on how it was done in this particular trial. Petitioner submits the real reason is that it is

extraordinarily difficult to defend such a lopsided method of picking those who will dispense justice...and mercy.

II.

PETITIONER'S CONVICTION WAS OBTAINED IN VIOLATION OF DUE PROCES OF LAW AND THE FIFTH AND SIXTH AMENDMENTS WHERE EVIDENCE OBTAINED FROM A POST-ARREST JUVENILE COURT/INVOLUNTARY COMMITMENT/ COMPETENCY EVALUATION WAS USED AGAINST HIM AT TRIAL.

A. FACTS

Respondent's counter-statement of the case [RB 7-12] reinterprets the facts in evidence in order to imply that David Buchanan was more involved - even then at most a bystander when the deceased was shot - or more callous (Buchanan "boasted..."[18]) than previously contended. Having conceded in the trial court, and before the jury,

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[18]In the Commonwealth's brief below at 8, petitioner "told" - which now has became a "boast" [RB 9].

that Buchanan was at best involved in a "conspiracy to commit the robbery.." [Transcript of Evidence, TE 1336], this approach seems disingenuous.

Vaguely referring to the testimony, respondent blurs the issue of the evidentiary support for an intentional murder and boldly claims any error is harmless. How, one might ask, can a constitutional error be harmless as to an intentional murder conviction when the prosecutor concedes before the jury that the proof of intentional murder is lacking?[19]

B. CONFUSION BY AMICI

Amici claim that Buchanan "selectively offered only those portions [of the pre-crime psychologial reports] which would support his

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[19]The Kentucky Supreme Court described this evidence as only "sufficient." Buchanan, 691 S.W.2d at 212 [A 83].

defense of extreme emotional disturbance" [AB 14]. Amici is wrong. Defense counsel had the witness read the entire reports, containing both "favorable" and "unfavorable" information, to the jury [A 39-41, 43-45, 46-47]. There was no unfairness to the Commonwealth.

Amici claim that Dr. Noelker's (not Lange's) report "would have been admissible against the Petitioner to establish future dangerousness as an aggravating circumstance had the death penalty been sought" [AB 16]. First, quite obviously, the death penalty wasn't sought. Second, future dangerousness is not, and never has been, an aggravating circumstance in Kentucky. KY.REV.STAT. 532.020. Third, Buchanan introduced this report, including the "portions" relied upon by amici, so what is the point?

C. SCOPE OF JUVENILE COURT EXAM

Estelle v. Smith, 451 U.S. 454, 467, 471 (1981) places great emphasis on the accused's "awareness of the Fifth Amendment privilege and the consequences of foregoing it..." as well as the accused's need of "the guiding hand of counsel" in deciding whether to participate.

The supplemental brief by respondent suggests that it is critical that Buchanan's counsel knew in advance of the psychiatric examination by Dr. Lange and, in fact, moved the juvenile court for it.[20] Amici falsely imply that

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[20]This information was not of record during the appeal below. Upon Kentucky's request, Buchanan has stipulated what a review of the tapes of the juvenile hearing would show so that this Court is not misled as to what actually happened. Until these tapes were unearthed recently by respondent, it was assumed by both parties that the psychiatric examination in question was, as it appears to indicate [A 72-73], a court-ordered competency examination.

Buchanan had adequate "notice of the scope of the interrogation" [AB 21]. In fact, this examination was sought by defense counsel and the prosecutor to determine whether David was "amenable to treatment" [Transcript of Hearing, TH 12/18/81, 8] and not for competency or to build an insanity defense. "This is a joint motion for a psychiatric evaluation... [T]he child is a committed ward of the state... [The defense contends] the child may be amenable to treatment"[21] [Transcript of Juvenile Court

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[21]Defense counsel's motive in requesting this examination may have been to get Buchanan some psychiatric treatment during his long wait in jail. It must be remembered that petitioner was released to the streets shortly after the Commonwealth decided he needed "treatment" [A 67]. Afterwards, the circuit judge sent petitioner to Kentucky's psychiatric center twice [R 396, TR 377]. "Keep as long as he needs treatment" [TR 126].

Another apparent purpose, perhaps shared by both
(footnote continued)

Tapes,[22] TJT 1,2]. Neither counsel nor the Court requested a competency examination. Dr. Lange reported on Buchanan's competency on his own initiative. "I was not asked to comment on competency" [TJT 9].

Respondent's thrust that Buchanan's only complaint is that he did not "obtain the desired diagnosis" [RB 47] is grossly misleading.

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parties, was to determine whether petitioner was a juvenile who was reasonably likely to be rehabilitated "by the use of procedures, services, and facilities currently available to the juvenile justice system." KY.REV.STAT. 208.170(3).

At any rate, this was a "joint" motion as amici [AB 17] and respondent [RB 42] admit.

[22]One of the juvenile hearing tapes has now been transcribed by respondent and is referred to by Kentucky [RB 43] and amici [AB 18] in their briefs, although the transcript is not of record. Since opposing counsel have relied on these tapes, in fairness petitioner must also.

to treatment" [R 357]. Second, the "desired diagnosis" would not have helped in an adult criminal trial at all. No insanity defense was ever intended or suggested. "The results of that inquiry were used for **a much broader objective that was plainly adverse to**" Buchanan. Smith, 451 U.S. at 465. "[A] heavy burden rests on the government to demonstrate that the defendant **knowingly and intelligently** waived his privilege against self-incrimination..." Miranda v. Arizona, 384 U.S. 436, 479 (1966). "Submitting to a psychiatric or psychological examination does not itself constitute a waiver of the Fifth Amendment's protection." Battie v. Estelle, 655 F.2d 692, 702 (5th Cir. 1981). "[N]either defense counsel's advance approval of a psychiatric examination nor his request for a psychiatric examination waives these constitutional rights." Cape v. Francis, 741 F.2d 1287, 1295 n.9 (11th

Cir. 1984); see Witt v. Wainwright, 714 F.2d 1069, 1075-76 (11th Cir. 1983), rev'd on other grounds, Wainwright v. Witt, 105 S.Ct. 844 (1985).

Smith did not hinge on whether defense counsel were "notified in advance" of the psychiatric examination but whether they were accurately "notified in advance [what issues] the psychiatric examination would encompass..."[23] Smith, 451 U.S. at 471.

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[23]There was some suggestion in Smith, 451 U.S. at 459 n.5, that defense counsel knew, in advance, of the psychiatric examination.

D. LEGITIMATE REBUTTAL?

i) The Psychological Reports Introduced by Buchanan were Obtained by the Commonwealth Prior to the Crime

Kentucky and amici contend that "[s]uch defendants should not be allowed to use the Fifth Amendment privilege as a shield to distort the truth..." [RB 41 n.15]. Rebuttal evidence is needed "to rectify any incomplete impressions...", otherwise the "Fifth and Sixth Amendments would insulate" a mental state defense from challenge [AB 20]. This argument might have some force in another case with different facts...but not here.

Harris v. New York, 401 U.S. 222, 226 (1971), was premised upon the legitimate concern that the Fifth Amendment not "be construed to

include the right to commit perjury."[24] This interest is not even remotely implicated here.

Whatever may be said for the need to protect the prosecution's right to develop mental state evidence to rebut a mental state defense[25]

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[24]Harris's "testimony...contrasted sharply with what he told police..." 401 U.S. at 226. He was impeached "on matters directly related to the crimes for which he was on trial." 401 U.S. at 228 (dissent).

[25]Kentucky law requires notice of an insanity defense and protects the prosecutor's right to obtain a psychiatric examination prior to trial. KY.REV.STAT. 504.070. This right has never been expanded to apply to the issue of "extreme emotional disturbance." Thus, as a matter of Kentucky law, the prosecution's interest in obtaining "rebuttal" evidence on the defendant's emotional state is considerably less than in situations where the defendant's sanity is in issue.

Furthermore, as claimed by respondent, "the state could have properly compelled petitioner to submit to examination by an independent psychiatrist" [Supplemental Brief for Respondent,

(footnote continued)

when a defense expert is retained or appointed is beside the point. The only proof offered by David Buchanan was developed by the Commonwealth and prior to the crime.[26] That the prosecutor was unhappy with the evidence is not of constitutional moment. The simple fact is that in this case there was no defense evidence manufactured on mental state issues which, in fairness, calls for rebuttal -- even had the Commonwealth decided to obtain legitimate, relevant rebuttal.

SB 4]. **But Kentucky choose not to do so!** Instead, as discussed infra in Sec. II D(ii), the prosecutor took a psychiatric report on an irrelevant issue and misused it.

[26]The reliability of pre-crime psychological evaluations obtained by Commonwealth employees is beyond dispute.

ii) Lange's Report was Irrelevant to the Issue Before The Jury and Grossly Misleading

Dr. Lange testified "the examination was limited in purpose" [TJT 6] and that the [KY. REV. STAT.] 202[A] criteria[27] involves someone being "put into a treatment setting...against their will... I do not see that he meets that criteria. That's not to say...that there are no problems...but...as far as...an involuntary commitment - I did not feel that he meets the criteria..." [TJT 29]. The "only thing that I was really looking at" was "the need for involuntary psychiatric commitment..." [TJT 38]. None of this, including Dr. Lange's volunteered opinion

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[27] KY. REV. STAT. 202A.026(2) requires that the person "reasonably benefit from treatment..." The "whole question" is whether someone needs "intensive in-patient...psychiatric treatment..." [TJT 30]. Buchanan didn't, according to Dr. Lange. This issue was irrelevant to "extreme emotional disturbance."

on competency, has anything to do with "extreme emotional disturbance." Simply stated this is not legitimate rebuttal evidence. Dr. Lange:

> I am not in the position to make expert testimony on [criminal responsibility] ...because I don't think that's within my purview... that would be [a] whole different set of criteria - nothing to do with whether he needs to have his freedom removed in order to undertake psychiatric treatment [TJT 39].

The juvenile court did not request Dr. Lange "to provide a full-blown psychiatric interview...dealing with any character disorder or emotional disturbance" [TJT 43]. Dr. Lange later stated: "I do not feel as an expert witness I was prepared to give expert testimony on something I was not asked to evaluate" [TJT 44]. Unfortunately, in adult court the prosecution voluntarily chose to forego insisting on a relevant psychiatric examination and, instead, decided to misuse Dr. Lange's evaluation under

the guise of rebuttal[28]. This violates due process.

Writing for the Court in United States v. Byers, 740 F.2d 1104, 1113 (D.C. Cir. 1984), Judge Scalia phrased the issue well:

> It seems to us at best a fiction to say that when the defendant introduces his expert's testimony he "waives" his Fifth Amendment rights...it is doubtful whether such a "waiver" could meet the high standard required for a voluntary, "free and unconstrained"...relinquishment of the Fifth Amendment privilege...

The real issue is whether denying rebuttal would have an "unreasonable and debilitating effect...upon society's conduct of a

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[28]The prejudice now appears even greater than petitioner previously believed. The transcript clearly shows that the use of Dr. Lange's report in circuit court was tantamount to use of false evidence. The actual meaning of the report, as the transcript now makes clear, did not remotely resemble the use the prosecutor made of it. Therefore, petitioner's inability to confront Dr. Lange now appears to be crucial. SIXTH and FOURTEENTH AMENDS., U.S. CONST.

fair inquiry into the defendant's culpability..." Id. The answer here is a ringing: "No!"

Harris v. New York, 401 U.S. at 225, did not involve any claim that the statements were "involuntary" or that Harris was misled. In fact, the "trustworthiness of the evidence [must] satisf[y] legal standards." See also Oregon v. Hass, 420 U.S. 714, 722 (1975). The opposite is true here. Neither David Buchanan or his lawyer knew, or could reasonably have known, the purpose to which his statements to Dr. Lange were to be put. In this sense, petitioner's cooperation with Dr. Lange was involuntary...not the **"product of a rational intellect and a free will..."** Blackburn v. Alabama, 361 U.S. 199, 208 (1960). "Due process of law requires that statements obtained as these were cannot be used in any way against a defendant at his trial." Mincey v. Arizona, 437

U.S. 385, 403 (1978). This means even in rebuttal.

E. INTRODUCTION OF JUVENILE COURT, CIVIL COMMITMENT AND/OR COMPETENCY EXAMS BY A PSYCHIATRIST, WHEN IRRELEVANT TO CRIMINAL RESPONSIBILITY, DENY DUE PROCESS OF LAW

The American Bar Assication Standards prohibit use of "any information" provided to "any person evaluating or providing mental health ...services... [A]ny information derived therefrom and any testimony of experts or others ...should be considered privileged...and should be used only in a proceeding to determine the defendant's competence to stand trial and related treatment or habilitation issues." Information elicited in a competency examination is only permitted in rebuttal when the defendant uses "the report or parts thereof for any other purpose." II American Bar Association Standards for Criminal Justice: Mental Health Standards, Sec. 7-4.6 (2nd Ed. 1980). Buchanan made no

attempt to use Dr. Lange's report. Thus, the "critical balancing of...interests" in the ABA Standards (Commentary) was not violated by petitioner.

Buchanan urged in his original brief that this Court should bar, under the Due Process Clause, use of court-ordered competency examinations to rebut mental state defenses because "references that are irrelevant and are elicited in bad faith" may deny the defendant a fair trial [BB 42-44]. United States v. Fortune, 513 F.2d 883, 888-889 (5th Cir. 1975). This case is a perfect example of this problem. "[C]riminal responsibility...is qualitatively different from competency...[29]" Cape v. Francis, 741 F.2d at

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[29] See 18 U.S.C. Sec. 4244, which states, in relevant part "[a] finding by the judge that the accused is mentally competent to stand trial shall in no way prejudice the accused in a plea
(footnote continued)

194; see Battie v. Estelle, 655 F.2d at 700-701. And so are different the other purposes of Dr. Lange's psychiatric exam: involuntary commitment and/or "amenability to treatment."

KY. REV. STAT. 202A.026, permitting involuntary hospitalization, is a civil proceeding. Psychiatric examinations can be compelled. Cf. Addington v. Texas, 441 U.S. 418 (1979). Likewise, juvenile court psychiatric examinations, such as this one, on "amenability to treatment" may be compelled. Juvenile proceedings "are 'civil' in nature and not criminal..." Kent v. United States, 383 U.S. 541,

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of insanity as a defense...such finding shall not be introduced in evidence on that issue nor otherwise be brought to the notice of the jury." See United States v. Davis, 496 F.2d 1026, 1029 (5th Cir. 1974), where a competency finding was brought to the attention of an "insanity defense jury." The court found "plain error" being "lead inescapably to the conclusion that Davis' right to a fair trial...was prejudically affected."

555 (1966). As such, Estelle v. Smith may not apply when the purpose of the psychiatric exam is "treatment." See Allen v. Illinois, 106 S.Ct. 2988, 2995 (1986). But an entirely different question is presented when "the privilege claimant" objects "against his compelled answers in any subsequent criminal case." 106 S.Ct. at 1995. Unlike the usual situation, "requiring the privilege against self-incrimination in... [later criminal] proceedings would...advance reliability" rather than thwart it. 106 S.Ct. at 2995. Often, as in this case, competency, commitment and/or treatment examinations are irrelevant to criminal responsibility and serve only to mislead the jury. Yet, the examinations themselves are essential for other reasons.

F. EXTREME EMOTIONAL DISTURBANCE/ BURDEN OF PROOF

A "major premise" [RB 31] of respondent's brief is a lengthy discussion [RB

31-38] of an important issue in Kentucky criminal law, but seemingly of little impact here - whether the mitigation element of "extreme emotional disturance" [EED] is an element of murder or an affirmative defense? Absent an understanding of why this is crucial, Buchanan will not reenter this fray.

G. HARMLESS ERROR?

The holding of the Kentucky Supreme Court that "[t]here is nothing in the record to support the argument that the murder was precipitated by extreme emotional disturbance", and thus any error was harmless, is wrong and suspect. Buchanan, 691 S.W.2d at 212 [A 83]. First, the Court actually relies upon the objectionable report in making this calculation. "There was also evidence of Buchanan's August 17, 1981 competency report..." 691 S.W.2d at 213 [A 83]. Second, the EED evidence was judged under a

revised standard announced long after the crime and the trial. Wellman v. Commonwealth, 694 S.W.2d 696 (Ky. 1985). See Hale v. Commonwealth, ___ S.W.2d ___ (Ky. 1986).

Finally, as argued supra in Sec. II A, the prosecutor conceded there was insufficient evidence of intentional murder by David Buchanan. His gross misuse of Dr. Lange's report and accusation that defense counsel concealed it [TE 1309] certainly contributed to the guilty verdict of intentional murder and maximum sentence.[30] The

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[30]Kentucky's unique procedure of jury sentencing must be accounted for in any harmless error analysis. In Abernathy v. Commonwealth, 439 S.W.2d 949, 953 (Ky. 1969), the Kentucky Supreme Court described the ingredients in a harmless error analysis under Kentucky procedure:

> Necessarily, one important circumstance in determining whether a particular error was prejudicial is the weight of the evidence. Another is the amount of punishment fixed by the verdict, especially with regard to the

(footnote continued)

Commonwealth cannot carry its burden demonstrating that this misuse of unconstitutional evidence was harmless beyond a reasonable doubt. Chapman v. California, 386 U.S. 18 (1967).

CONCLUSION

For all the reasons stated here and in Buchanan's original brief, petitioner respectfully requests that the decision of the Kentucky Supreme Court in his case be reversed.

Respectfully submitted,

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allowable minimum and maximum (emphasis added).

See also Niemeyer v. Commonwealth, 533 S.W.2d 218, 222 (Ky. 1976).

CERTIFICATE OF SERVICE

I hereby certify that copies of this Reply Brief have been mailed, first class postage prepaid, to David A. Smith and C. Lloyd Vest, II, Assistant Attorney Generals, Capitol Building, Frankfort, Kentucky 40601-3494 and David W. Lee and Susan Stewart Dickerson, Assistant Attorney Generals, 112 State Capitol Building, Oklahoma City, Oklahoma 73105, this the 24th day of December, 1986.

No. 85-5348

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

DAVID BUCHANAN
Petitioner,
v.
COMMONWEALTH OF KENTUCKY
Respondent.

On Petition for Writ of Certiorari
to the Supreme Court of Kentucky

BRIEF OF AMICI CURIAE ARKANSAS, CONNECTICUT, DELAWARE, FLORIDA, GEORGIA, GUAM, HAWAII, ILLINOIS, INDIANA, KANSAS, LOUISIANA, MISSISSIPPI, MISSOURI, NEBRASKA, NORTH CAROLINA, OKLAHOMA, OREGON, PENNSYLVANIA, SOUTH CAROLINA, TENNESSEE, VIRGINIA, and WASHINGTON*

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BRIEF OF AMICI CURIAE
IN SUPPORT OF THE PETITIONER

INTEREST OF AMICI CURIAE

The amici curiae are states (and the Government of Guam) who have an interest in the issue of joinder for trial of defendants who have participated in the same act or series of criminal acts.

The amici submit this brief through their Attorneys General[1] pursuant to Sup.

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[1] The State of Connecticut joins this brief through its Chief State's Attorney, who is the chief criminal law enforcement officer of that state.

Ct.R. 36.4. This brief is presented in support of the Respondent Commonwealth of Kentucky.

ARGUMENT

PROPOSITION I

THE UNITED STATES CONSTITUTION DOES NOT PROHIBIT THE EXCLUSION OF WITHERSPOON EXCLUDABLES IN A CASE WHERE A NON-CAPITAL DEFENDANT IS JOINED FOR TRIAL WITH A CAPITAL DEFENDANT WHEN THE DEFENDANTS PARTICIPATED IN THE SAME ACT OR ACTS WHICH CAUSED THE MURDER.

The Petitioner contends that death qualification of a jury in a case where a non-capital defendant has been joined for trial with a capital defendant violates the constitutional rights of the non-capital defendant.

The amici contend that the constitutional theories upon which the Petitioner's argument is based were rejected by the Supreme Court in the case of Lockhart v. McCree, 106 S.Ct. 1758 (1986).

The Petitioner cannot contend that exclusion of persons who refuse to consider the death penalty regardless of the facts and circumstances of the case are a cognizable class under Sixth Amendment principles, which require that a jury panel be selected from a representative cross-section of the community. See Lockhart, 106 S.Ct. at 1765.

Furthermore, in Lockhart the Supreme Court did not accept the statistical analysis which the Petitioner in this case again presents. Id. at 1761-64. The Court also specifically rejected the proposed application of the cross-section principle to invalidate the use of either for-cause or peremptory challenges to prospective jurors. Id. at 1764-65.

This Court recognized the state's legitimate interest in death qualification of juries and held that there was little

danger that death qualification would be used as a means "to arbitrarily skew the composition of capital-case juries." Lockhart, 106 S.Ct. at 1766.

The present case involves the state's interest in the joinder of defendants who are alleged to have participated in the same act or transaction or the same series of acts or transactions which constitute an offense. Joinder of defendants under these circumstances is widely recognized. Fed.R.Crim.P. 8(b); 1 C. Wright, Federal Practice & Procedure, § 213 (1982).

In federal trials, it has been stated "[p]ersons indicted together should ordinarily be tried together." United States v. DeVeau, 734 F.2d 1023, 1027 (5th Cir. 1984). See also United States v. Lee, 743 F.2d 1240, 1248 (8th Cir. 1984) ("The general rule is that persons charged in a conspiracy should be tried together, par-

ticularly where proof of the charges against the defendants is based upon the same evidence and acts.").

The reason why joinder of defendants is a desirable practice is explained in Standards for Criminal Justice, § 13-2.2 commentary at 17 (1986):

> Seriatim trials increase the burden on victims and witnesses, delay the disposition of the charges, and expand the drain on prosecutorial and judicial resources. In addition, separate trials can produce inconsistent results which may undermine public confidence in the criminal justice system.

(Footnotes omitted). See also Bruton v. United States, 391 U.S. 123, 143 (1968) (White, J. dissenting).

Policy considerations supporting joinder of defendants in federal trials are so strong that it has been held that even if the conspiracy count that forms the sole basis for joinder is dismissed at the close of the government's case, the

defendants are not entitled to severance. Schaffer v. United States, 362 U.S. 511 (1960). Cf. United States v. Lane, 106 S.Ct. 725 (1986) (misjoinder of defendants constitutes a constitutional violation only if it results in prejudice so great as to deny a defendant his Fifth Amendment right to a fair trial).

Lockhart recognized the state's interest in the unitary jury system, which "serves the State's entirely proper interest in obtaining a single jury that could impartially decide all of the issues in McCree's case." 106 S.Ct. at 1768. (emphasis added). The amici contend that the state has an equally valid interest in having a single jury decide all issues involving two or more defendants who participate in the same series of criminal acts, despite the fact that punishments may differ as to each.

This Court in Lockhart also acknowledged that the defendant himself might benefit from "'residual doubts' about the evidence presented at the guilt phase." Lockhart, 106 S.Ct. at 1769.

In the present case, where the state seeks the death penalty against one defendant but not the other, the amici contend that the non-capital defendant may benefit from the fact that the jury which decides his guilt or innocence is also aware that his capital co-defendant is being convicted and punished. It is in the interest of the non-capital defendant that the jury know that someone is being punished for what was done and to know exactly what that punishment is.

If the non-capital defendant is tried separately, the jury would not know what punishment the capital defendant received and might overreact with respect to decid-

ing the guilt or innocence and punishment of the non-capital defendant. This danger is particularly real in a case such as the present one, which involves a particularly outrageous set of circumstances committed by more than one defendant.

The amici contend that it is appropriate that one jury decide guilt or innocence and assess levels of punishment with regard to all actors in a criminal episode.

Furthermore, if this Court decides that a state must try a capital defendant and a non-capital defendant separately, this may encourage prosecutors to request the death penalty against an undeserving defendant in order to avoid separate trials.

Additionally, defendants who receive a life sentence after the state has attempted to obtain a death sentence could

claim that they were denied a fair trial because the state should not have sought the death penalty in their case. This would lead to endless post-trial second-guessing about whether the prosecutor's decision to seek the death sentence was appropriate.

Lockhart laid to rest the issue of whether the constitutional rights of a capital defendant who received a life sentence were violated when the issues of guilt, innocence, and punishment were decided by a death qualified jury. The petitioner McCree in the Lockhart case received a punishment of life without parole. The amici contend that since this Court held that the petitioner in Lockhart received the fair trial, there is no difference between his case and the present one. If the trial was fair for the petitioner in Lockhart on the issue of

guilt, and if it is fair for defendants who receive the death penalty imposed by a death qualified jury, it should be held to be fair to the Petitioner in the present case.

Additionally, if this Court were to hold that a non-capital defendant is entitled to severance from a capital defendant, there is no reason why a capital defendant would not have the right to insist that he receive a separate trial with regard to the non-capital crimes he was charged with that arose out of the same transaction.

The Court has mandated constitutionally required severance in only one circumstance, that is, when the introduction of a co-defendant's confession would deny the defendant his right to confrontation of witnesses. Bruton v. United States, 391 U.S. 123 (1968). See also Lee v.

Illinois, 106 S.Ct. 2056 (1986). The amici request that this Court reject what would be an additional theory of constitutionally required severance.

This Court's ruling in Bruton was justified because the introduction of a confession against a non-testifying defendant violated a specific provision of the United States Constitution, that is, the Sixth Amendment's guarantee of the right to confrontation of witnesses. However, the Petitioner in the present case can point to no specific constitutional provision which was violated by the joinder of his case with that of his co-defendant.

This is particularly true since, as noted above, this Court has rejected the contention that exclusion of Witherspoon excludables denies a defendant the right to a fair cross-section of the community being represented on his jury. Instead,

the Petitioner must rely only on the more general principles of the Due Process Clause of the Fourteenth Amendment. However, in Donnelly v. De Christoforo, 416 U.S. 637, 643 (1974), the Court made the following statement when it rejected a contention concerning a prosecutor's closing argument:

> This is not a case in which the State has denied the defendant the benefit of a specific provision of the Bill of Rights, such as the right to counsel, Argersinger v. Hamlin, 407 U.S. 25 (1972), or in which the prosecutor's remarks so prejudiced a specific right, such as the privilege against compulsory self-incrimination, as to amount to a denial of that right. Griffin v. California, 380 U.S. 609 (1965). When specific guarantees of the Bill of Rights are involved, this Court has taken special care to assure that prosecutorial conduct in no way impermissibly infringes them.

(Footnote omitted).

In the present case, since no specific guarantee of the Bill of Rights has been violated, the Petitioner cannot con-

tend that the Fourteenth Amendment imposes a bar to the state's interest in requiring defendants who commit a series of criminal actions together to be tried jointly.

For the reasons stated, the amici request that the Petitioner's arguments relating to the exclusion of Witherspoon excludables be rejected.

PROPOSITION II

THE LIMITED HOLDING IN ESTELLE V. SMITH IS INAPPOSITE BECAUSE THE LANGE REPORT WAS PRESENTED TO REBUT EVIDENCE PRESENTED BY THE PETITIONER; FURTHERMORE, ESTELLE ALSO DOES NOT APPLY BECAUSE THE PETITIONER: (1) PRESENTED A DEFENSE OF EXTREME EMOTIONAL DISTURBANCE; (2) KNEW THE SCOPE OF THE EVALUATION SINCE IT WAS REQUESTED BY HIS OWN COUNSEL; AND (3) WAS NOT QUESTIONED CONCERNING THE CIRCUMSTAMCES OF THE OFFENSE FOR WHICH HE WAS CHARGED.

The amici contend that the decision of this Court in Estelle v. Smith, 451 U.S. 454 (1981), is readily distinguishable from the present case, since here a

competency report was introduced by the Commonwealth only after the Petitioner had introduced psychiatric evidence from other governmental reports, and selectively offered only those portions which would support his defense of extreme emotional disturbance.

In Estelle v. Smith, 451 U.S. at 468, the Court held:

> A criminal defendant, who neither initiates a psychiatric evaluation nor attempts to introduce any psychiatric evidence, may not be compelled to respond to a psychiatrist if his statements can be used against him at a capital sentencing proceeding.

(Emphasis added). These important distinctions were recognized by the court in United States v. Byers, 740 F.2d 1104, 1110-11 (D.C. Cir. 1984) (Scalia, J., plurality opinion).

The Petitioner in the present case introduced psychiatric evidence by ques-

tioning his social worker concerning several evaluations of him made by personnel in the Commonwealth's juvenile justice system. Those evaluations focused upon his limited intelligence and emotiona' makeup. All of those evaluations were conducted prior to the date of the crime in the present case (JA 39-48).

One of those psychological evaluations in particular serves as a basis of distinction from the situation in Estelle v. Smith. The Petitioner himself offered evidence of his future dangerousness by the reading of his August 21, 1980, psychological evaluation by Dr. Robert W. Noelker, a licensed clinical psychologist. That report reflected, in relevant part:

> In view of the presence of extreme unmet dependency needs, early and sustained frustration, and minimal success in almost any endeavor there exists the strong probability that underlying considerable passivity and and [sic] withdrawal if exten-

> sive anger and perhaps even range. Thus, under the proper circumstances, David could be expected to be dangerous with respect to acts against persons. While this has not been a part of his history, it needs to be considered with respect to future treatment and eventual disposition.

(Emphasis added). (JA 45,65). Such expert psychiatric testimony certainly would have been admissible against the Petitioner to establish future dangerousness as an aggravating circumstance had the death penalty been sought. See Barefoot v. Estelle, 463 U.S. 880 (1983).

The amici submit that refusal to allow the Commonwealth to cross-examine the social worker concerning the Petitioner's competency evaluation completed at his request in connection with the instant crime would "deprive the State of the only effective means it has of controverting his proof on an issue that he interjected into the case." Estelle v.

Smith, 451 U.S. at 465. See also United States v. Byers, 740 F.2d at 1110.

At issue was whether the Petitioner suffered from extreme emotional disturbance. As the Kentucky Supreme Court aptly reasoned, the Petitioner opened the door for introduction of the Dr. Lange competency report[2] by introducing only those Department of Human Resources reports beneficial to him. Commonwealth v. Buchanan, 691 S.W.2d 210, 213 (Ky. 1985).

Furthermore, Dr. Lange's report had been prepared at the joint request of the Petitioner's attorney and counsel for the Commonwealth in district court juvenile proceedings prior to Petitioner's transfer

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[2] The August 17, 1981, document was reported in both the testimony of the social worker and the Kentucky Supreme Court opinion to have been authored by a "Dr. Ryan." Apparently the misnomer was either a reading mistake by the social worker or a transcription error by the court reporter.

to circuit court. In fact, counsel for the Petitioner had the opportunity to question Dr. Lange regarding the report on August 19, 1981. (See tape of the August 19, 1981 juvenile hearing). Additionally, a request for a follow-up examination was made with the admonition of the trial court that no inquiry be made of the Petitioner "regarding the circumstances of the offenses which are charged against him." (See transcript of November 28, 1981 hearing, Tr. 11-17).

In Alvord v. Wainwright, 725 F.2d 1282, 1293 (11th Cir. 1984), cert. denied, 469 U.S. 956 (1984), the United States Court of Appeals for the Eleventh Circuit distinguished Estelle v. Smith, in part, because trial counsel for the defendant Alvord requested the psychiatrist to examine Alvord.

The cross-examination of the Petitioner's social worker can be construed as a rebuttal of the Petitioner's emotional disturbance defense rather than an impermissible presentation of evidence of future dangerousness condemned by this Court in Estelle v. Smith, 451 U.S. at 467. The report by Dr. Lange recited no conclusions based upon statements by the Petitioner concerning his crimes. Cf. United States v. Stockwell, 743 F.2d 123, 125-26 (2d Cir. 1984) (prosecutor was within legitimate bounds of cross-examination in challenging an insanity defense by use of information gleaned from the defendant during his psychiatric examination).

Furthermore, the Lange report did not offer any improper opinions regarding the Petitioner's criminal responsibility. Cf. Cape v. Francis, 741 F.2d 1287, 1294 (11th Cir. 1984), cert. denied, 106 S.Ct. 281

(1985) (admission of diagnosis regarding criminal responsibility based on the substance of disclosures made during a custodial interrogation was harmless).

To permit the Petitioner to edit his juvenile file for selective use of favorable information in presenting a defense of extreme emotional disturbance without allowing the Commonwealth to rectify any incomplete impressions created by such use of the file on a claim of violation of the Fifth and Sixth Amendments would insulate any defendant from a challenge to his defense of insanity or diminished mental capacity. This Court has repeatedly recognized that matters ordinarily not admissible in the state's presentation of its case-in-chief may be admissible upon cross-examination as impeachment evidence. See Harris v. New York, 401 U.S. 222 (1971). See also Fletcher v.

Weir, 455 U.S. 603 (1982); Anderson v. Charles, 447 U.S. 404 (1980); Jenkins v. Anderson, 447 U.S. 231 (1980). Cf. Wainwright v. Greenfield, 106 S.Ct. 634 (1986) (evidence of post-arrest silence as affirmative proof of sanity rather than as impeachment evidence violates due process).

Because the present situation is not an example of self-incrimination without warnings as condemned in Miranda v. Arizona, 384 U.S. 436 (1966), nor an instance in which counsel for the accused has no notice of the scope of the interrogation, the amici submit that application of Estelle v. Smith, 451 U.S. 454, is inapposite, as the Kentucky Supreme Court concluded. Reaching a contrary conclusion would severely cripple a prosecutor's right to cross-examine defense witnesses on issues relevant to that defense.

CONCLUSION

For the reasons stated, the amici respectfully request that the decision of the Supreme Court of Kentucky be affirmed.

Respectfully submitted,

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